TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 894.

THE UNITED STATES, APPELLANT,

vs.

THE JOINT TRAFFIC ASSOCIATION ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 30, 1897.

(16,544.)

(16,544.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 765.

THE UNITED STATES, APPELLANT,

vs.

THE JOINT TRAFFIC ASSOCIATION ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Transcript from the circuit court of the United States for the southern district of New York	1	1
Caption	1	1
Bill of complaint	2	2
Exhibit A—Articles of organization of the Joint Traffic Association, adopted November 19, 1895, to take effect January 1, 1896, &c.	15	15
Order granting leave to amend bill	46	46
Affidavit of Wallace Macfarlane	47	47
Amendment to bill of complaint	48	48
Appearance for The Joint Traffic Association	50	50
The N. Y. Central and Hudson River R. R. Co.	51	51
The Lake Shore and M. S. R'y Co. *et al.*	52	52
The Penna. R. R. Co.	53	53
The Lehigh Valley R. R. Co.	54	54
The Chesapeake and Ohio R'y Co. *et al.*	55	55
The West Shore R. R. Co. *et al.*	56	56
The Central R. R. Co. of N. J.	57	57
The Delaware, L. & W. R. R. Co.	58	58
The Allegheny Valley R'y Co. *et al.*	59	59
The Baltimore and Ohio R. R. Co. *et al.*	60	60
The Wabash R. R. Co.	61	61

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1897.

	Original.	Print.
Answer of The Joint Traffic Association	62	62
Stipulation amending answer of The Joint Traffic Association	94	94
Answer of The New York Central and Hudson River R. R. Co.	98	98
Stipulation amending answer of The New York Central and Hudson River R. R. Co.	130	130
Answer of The Lake Shore and Michigan Southern Railway Company	134	134
Stipulation amending answer of The Lake Shore and Michigan Southern Railway Company	166	166
Answer of The Pennsylvania Railroad Company *et al.*	169	169
Stipulation amending answer of The Pennsylvania R. R. Co. *et al.*	185	185
Answer of The Lehigh Valley Railroad Company	188	188
Stipulation amending answer of The Lehigh Valley R. R. Co.	204	204
Stipulation as to record on appeal	207	207
Stipulation as to record on appeal	208	208
Opinion of Wheeler, J	211	211
Decree	218	218
Assignment of errors	220	220
Notice of appeal	224	224
Petition for appeal	226	226
Order allowing appeal	227	227
Citation	228	228
Clerk's certificate	231	231
Decree	233	233
Assignment of errors	236	235
Notice of appeal	241	238
Petition for appeal	244	240
Order allowing appeal	245	241
Citation	247	242
Proof of service of citation	250	244
Clerk's certificate	251	244

Circuit Court of the United States

1

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity.

THE UNITED STATES OF AMERICA,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY; THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY; THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY.

2

3

4 *To the Honorable the Judges of the Circuit Court of the United States, in and for the Southern District of New York:*

The United States of America, by Wallace Macfarlane, their attorney for the Southern District of New York, acting in this behalf under the direction of the Attorney General of the United States, on information and belief, complain and say:

That the New York Central & Hudson River Railroad Company is a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the Southern District of New York.

5 That the West Shore Railroad Company is a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the Southern District of New York.

That the Lake Shore & Michigan Southern Railway Company is a corporation organized and existing under the laws of the States of New York, Ohio, Pennsylvania, Michigan, Indiana and Illinois, and having an office for the transaction of business in the City of New York, in the Southern District of New York.

That the New York, Ontario & Western Railway
6 Company is a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the Southern District of New York.

That the Erie Railroad Company is a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the Southern District of New York.

That the Allegheny Valley Railway Company; the Delaware, Lackawanna & Western Railroad Company; the Lehigh Valley Railroad Company;

the Pennsylvania Company; the Pennsylvania 7
Railroad Company; the Philadelphia & Reading
Railroad Company; the Philadelphia, Wilmington
& Baltimore Railroad Company; the Pittsburg &
Western Railway Company; the Pittsburg, Cin-
cinnati, Chicago & St. Louis Railway Company
are, and each of them is, a railroad corporation
organized and existing under the laws of the State
of Pennsylvania.

That the Baltimore & Ohio Railroad Company
and the Northern Central Railway Company are
corporations organized and existing under the laws
of the State of Maryland.

That the Baltimore & Ohio Southwestern Rail- 8
way Company; the Cleveland, Cincinnati, Chicago
& St. Louis Railway Company are corporations
organized and existing under the laws of the States
of Ohio, Indiana and Illinois; that the Pittsburg
& Lake Erie Railroad Company is a corporation
organized and existing under the laws of the States
of Ohio and Pennsylvania.

That the Chesapeake & Ohio Railway Company
is a corporation organized and existing under the
laws of Virginia and West Virginia.

That the Chicago & Grand Trunk Railway Com-
pany; the Detroit, Grand Haven & Milwaukee
Railway Company; the Grand Rapids & Indiana 9
Railroad Company; the Michigan Central Railroad
Company are corporations organized and existing
under the laws of the State of Michigan.

That the Central Railroad Company of New
Jersey is a corporation organized and existing
under the laws of the State of New Jersey.

That the Chicago & Erie Railroad Company and
the Terre Haute & Indianapolis Railroad Company
are corporations organized and existing under the
laws of the State of Indiana.

10 That the Toledo, Peoria & Western Railway Company is a corporation organized and existing under the laws of the State of Illinois.

That the New York, Chicago & St. Louis Railroad Company is a corporation organized and existing under the laws of the States of New York, Pennsylvania, Ohio and Indiana.

That the Wabash Railroad Company is a corporation organized and existing under the laws of the States of Missouri, Ohio, Michigan, Illinois and Indiana.

That the Grand Trunk Railway Company of
11 Canada is a railroad corporation organized and existing under the laws of the Dominion of Canada.

That the Joint Traffic Association is a voluntary association organized under certain "Articles of Organization," entered into and executed by the several railroad and railway companies hereinbefore named, all of which will hereafter be more particularly set forth; and the principal place of business of said Joint Traffic Association is in the City of New York, in the Southern District of New York.

That all the defendants are common carriers, incorporated as aforesaid, either by special char-
12 ters granted by the several states of the United States, or under the public statutes of such states, as hereinbefore more particularly set forth; and as such common carriers, at all the days and times hereinafter mentioned, and prior thereto, were and still are engaged in the transportation of freight and passengers, either separately or in connection with each other, in trade and commerce continuously carried on among the several states of the United States, and among and between the several states of the United States and the territories thereof, and between such states and territories and foreign countries, and from places in the

United States through foreign countries to other 13
places in the United States.

That prior to the 19th day of November, 1895, the defendants above named, and more especially the Baltimore & Ohio Railroad Company with the railroads constituting in union with it what is termed in said agreement the Baltimore and Ohio system; the Chesapeake & Ohio Railway Company with the railroads constituting in union with it what is termed in said agreement the Chesapeake and Ohio system; the Erie Railroad Company with the railroads constituting in union with it what is termed in said agreement the Erie system; the Grand Trunk Railway Company of Canada with 14
the railroads constituting in union with it what is termed in said agreement the Grand Trunk system; the Delaware, Lackawanna & Western Railroad Company with the railroads constituting in union with it what is termed in said agreement the Lackawanna system; the Lehigh Valley Railroad Company with the railroads constituting in union with it what is termed in said agreement the Lehigh Valley system; the Pennsylvania Railroad Company with the railroads constituting in union with it what is termed in said agreement the Pennsylvania system; the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Michigan 15
Central Railroad Company, the West Shore Railroad Company and the other railroads constituting in union with the said four last mentioned companies what is termed in said agreement the Vanderbilt system; and the Wabash Railroad Company with the railroads constituting in union with it what is termed in said agreement the Wabash system, with their leased, controlled or operated lines, owned, operated and controlled separate railroad lines or systems, engaged with their connections independently in trade and commerce among the states and territories of the United

States and with foreign nations, and were prior to the said 19th day of November, 1895, in active competition with each other for such traffic both in freight and passengers, and furnished to all persons engaged in such traffic or travel among the states and territories of the United States separate and independent and competitive lines of transportation in respect to the traffic hereinafter mentioned.

That on or about the 19th day of November, 1895, the said railroads, unlawfully intending to restrain trade and commerce among the several states, and attempting to monopolize such trade and commerce, and intending to restrain and prevent competition among the said railroads in respect to all the inter-state trade and commerce, hereinafter more particularly described, and contriving and intending unlawfully and unjustly to deprive the public engaged in such inter-state trade and transportation of the facilities and advantages which the said public had theretofore enjoyed from the independent competition of said railroads, or any of them, in respect to the traffic hereinafter more particularly described, and intending to establish and maintain rates of freight and passenger transportation fixed arbitrarily and uninfluenced by competition in respect to such traffic between the states and territories of the United States and between such states and territories and foreign countries, entered into a certain unlawful contract, agreement, combination and conspiracy, to restrain trade and commerce among the several states, in the form of a written document, entitled "Articles of Organization of the Joint Traffic Association."

That a copy of said Articles of Organization is hereto annexed, as Exhibit "A," and as a part of this complaint.

That the said agreement establishes a Board of Managers consisting of representatives of a num-

ber of the railroad companies or systems, parties thereto, and besides conferring upon said Board of Managers many other powers more particularly set forth in the said agreement, Exhibit "A," authorizes the said Board to construe the said agreements and all resolutions adopted thereunder; to establish rates, fares, charges and rules for governing the traffic within the scope of the agreement; to determine when the said agreement has in any respect been violated by any of the parties thereto, and (within the maximum established by said agreement) to determine the amount of and assess the penalties for said violations and to decide and determine the amount of the monthly assessments to be levied by the railroad companies, parties to said agreement, as their monthly contribution to the expenses of the said Joint Traffic Association.

That by the said agreement the said companies surrendered to the said Association, subject to certain exceptions hereinafter stated, all the competitive traffic passing from, to or through the western termini of the Trunk lines, namely, Toronto, Canada; Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk and Salamanca, New York; Erie, Pittsburg and Allegheny, Pennsylvania; Bellaire, Ohio; Wheeling, Parkersburg, Charleston and Kenova, West Virginia, and Ashland, Kentucky; and such other points as might thereafter be designated as such termini by the Board of Managers constituted by said agreement; also all other traffic which might pass through other junctions of the companies, parties thereto, which is included when passing through any of the termini or junctions above stated, or that might thereafter be designated by said Board of Managers; and all such other traffic as, by common consent of the parties to said agreement, might thereafter be included within the scope of the same. All subject to the following exceptions only:

22 Coal, coke, iron ore, mill cinder, lime stone and petroleum crude or refined, and traffic destined to or coming from Florida, Georgia, North and South Carolina, Virginia and West Virginia, South of the south line of the Chesapeake & Ohio Railway.

That the traffic first above described constitutes a considerable and important part of all the freight and passenger traffic carried on between the several states and territories of the United States and between them and adjacent foreign countries, and, prior to the consummation of the oppressive and unlawful contract, agreement, combination and conspiracy aforesaid, the said railroad companies and systems, or many of them, were in active, open, 23 independent competition with each other for said traffic, to the great advantage of the public engaged in said traffic, and to the great benefit and advantage of the United States.

That in and by the terms of the aforesaid unlawful contract, agreement, combination and conspiracy, as set forth in the said Articles of Organization, Exhibit "A," the said railroad companies, parties thereto, in order to terminate all competition among themselves for the freight and passenger traffic aforesaid, unlawfully agreed to surrender the control of such traffic to the Board of Managers created by the terms of the said agreement or Arti- 24 cles of Organization as aforesaid; and further agreed, in pursuance of their said unlawful purpose, to terminate existing through, co-operative and commission freight lines, or to limit the business of the same; to abandon all independent agencies for soliciting or contracting for any of the freight or passenger traffic within the scope of the said Articles of Organization, and to vest in the said Board of Managers full authority to organize joint freight and passenger agencies, as they might deem desirable; and each and every of the said companies, in and by the said Articles of Organization, agreed not to maintain, directly or indirectly, in respect to the traffic

covered by said agreement, any freight or passen- 25
ger agency except with the approval of the said Board of Managers, and to employ nobody in soliciting or contracting for any of such traffic to whom the said Board of Managers should object; and the said companies, in and by the said agreement, surrendered to the said Board of Managers full and absolute control over all the said competitive inter-state traffic and commerce, hereinbefore more particularly described, as within the scope of said agreement.

And in and by the said agreement the said companies, unlawfully and in restraint of trade and commerce among the several states, agreed that 26
the said Board of Managers, to whom full control of all the aforesaid competitive traffic was surrendered and entrusted by the terms of said agreement, should divide the said competitive traffic among the railroad companies, parties to said agreement, in such proportions as they, the said Board of Managers, should determine, thereby unlawfully combining a large part of the freight business of the aforesaid several competing railroads and railroad systems, restraining and preventing competition among the said railroads in respect to all such competitive traffic, and thereby unlawfully restraining trade and commerce among the several states and territories of the United States, and unlawfully attempting to monopolize a part of such inter-state 27
trade and commerce.

That the said several railroads and systems, parties to said contract, agreement or Articles of Organization aforesaid, in and by the said agreement or Articles of Organization, and in furtherance of their aforesaid unlawful purpose to restrain inter-state trade and commerce by unlawfully pooling or combining the large and important part thereof, hereinbefore described, and for which, prior to the date of said agreement, the said railroads or many of them were actively and independently competing, to the

great advantage of the public, and of the United States, both in facilities and in rates, fares and charges, unlawfully agreed that the Board of Managers created by said agreement and thereby charged with the execution thereof, should have power to establish the rates, fares and charges for carrying such traffic, both freight and passenger; and conferred upon said Board of Managers, full power to determine, when in their judgment necessary, the divisions of such rates, fares and charges between connecting companies, parties to said agreement, and between companies, parties to said agreement, and other railroad companies connecting with the parties to said agreement, or any of them; thereby unlawfully, and in restraint of inter-state trade and commerce, contracting, agreeing and combining among themselves for the division between them of a portion of the earnings of the said several railroad companies, parties to the said agreement or Articles of Organization.

That in or by said agreement or Articles of Organization the railroad companies and systems aforesaid, parties thereto, further to carry out and achieve their oppressive and illegal purposes aforesaid, agreed that any failure to abide by the rates, fares and charges to govern the inter-state traffic and commerce aforesaid, as established by the Board of Managers aforesaid, should be deemed a violation of said agreement or Articles of Organization; and that the company or companies committing such violation should be subjected to severe fines and penalties, in said agreement termed "forfeitures," that is to say, the said several railroad companies, parties to the said agreement, contracted and agreed that for any action by any party to said agreement, which, in the judgment of the said Board of Managers, should constitute a violation of said agreement, the offending company should forfeit to the Association a sum or fine or penalty, to be fixed by the said Managers, not exceeding $5,000,

with power to the said Managers, where the gross 31
receipts of any railroad company, party to said agreement, from the transaction held by the said Managers to be a violation of said agreement, should exceed $5,000, to fix the said fine, penalty or forfeiture, in their discretion, at a sum equal to the whole of such gross receipts.

That for the further manifold, unjust, oppressive and unlawful provisions of said agreement or Articles of Organization, therein inserted in furtherance of the purpose of the said railroad companies, parties thereto, to combine their freight and divide their earnings, or some portion thereof, and in other respects to restrain and monopolize trade and commerce among the several states and terri- 32
tories of the United States, reference is made to the copy of said agreement, herewith annexed as Exhibit "A," as a part of this complaint.

That in and by the terms of said agreement it is provided, subject to the right of any company to retire therefrom upon giving ninety days' written notice, that the said agreement shall take effect on January 1st, 1896, and continue in existence for five years thereafter.

That it is further provided in said agreement that the Board of Managers, therein created and charged with the duty of executing the same, shall have their principal office in the City of New York, in 33
the Southern District of New York.

That the said Board of Managers has been organized under said agreement, and consists of the following named officers and agents of a number of the railroad companies, parties to said agreement, to wit:

H. J. Hayden, Second Vice-President of the New York Central & Hudson River Railroad Company (Chairman); John Burton, General Freight Agent of the Grand Trunk Railway Company of Canada; George G. Cochran, Fourth Vice-President of the

Erie Railroad Company; John B. Garrett, Third Vice-President of the Lehigh Valley Railroad Company; D. S. Gray, General Agent of the Pennsylvania Railroad Company; B. A. Hegeman, Traffic Manager of the Delaware, Lackawanna & Western Railroad Company; Milton Knight, Traffic Manager of the Wabash Railroad Company; Oscar G. Murray, Second Vice-President of the Chesapeake & Ohio Railroad Company; and Orlando Smith, First Vice-President of the Baltimore & Ohio Railroad Company.

That the said railroad companies are preparing to put into full operation all the provisions of their said unlawful agreement or Articles of Organization aforesaid, and, through their Board of Managers and other officers, are now actively holding meetings in the City of New York and Southern District of New York for such unlawful purpose—all to the great detriment and disadvantage of the public and in violation of the laws of the United States in this behalf.

In consideration whereof, the United States of America pray your Honors to adjudge and decree that the said agreement is unlawful, null and void, and that the defendants, and each and every of them, and their officers, agents and servants, and each and every of them be enjoined, perpetually, from continuing in the combination or Association established by the said agreement, and from acting or in any way operating their roads thereunder, either in respect to the provisions of said agreement, by which all the competitive traffic therein described is surrendered to a Board of Managers, to be divided by said Managers among the several companies, parties to the agreement, or in respect to the establishment of rates, fares and charges by said Board of Managers, or in respect to the division among the several companies, parties to said agreement, by said Board of Managers, of the said rates, fares and charges

for the transportation of the freight and pas- 37
senger traffic within the scope of said agreement, or in any other respect whatever; and for such other and further relief in the premises as the nature of the case shall require, and as to the Court shall seem fit.

And to the end that the United States of America may obtain the relief to which they are justly entitled in the premises, may it please your Honors, grant unto them writs of subpœna directed to the said The Joint Traffic Association; the New York Central & Hudson River Railroad Company; the West Shore Railroad Company; the New York, Ontario & Western Railway Company; the Erie 38
Railroad Company; the Allegheny Valley Railway Company; the Baltimore & Ohio Railroad Company; the Baltimore & Ohio Southwestern Railway Company; the Central Railroad of New Jersey; the Chesapeake & Ohio Railway Company; the Chicago & Erie Railroad Company; the Chicago & Grand Trunk Railway Company; the Cleveland, Cincinnati, Chicago & St. Louis Railway Company; the Delaware, Lackawanna & Western Railroad Company; the Detroit, Grand Haven & Milwaukee Railway Company; the Grand Rapids & Indiana Railroad Company; the Grand Trunk Railway Company of Canada; the Lake Shore & Michigan Southern Railway Com- 39
pany; the Lehigh Valley Railroad Company; the Michigan Central Railroad Company; the New York, Chicago & St. Louis Railroad Company; the Northern Central Railway Company; the Pennsylvania Company; the Pennsylvania Railroad Company; the Philadelphia & Reading Railroad Company; the Philadelphia, Wilmington & Baltimore Railroad Company; the Pittsburg & Lake Erie Railroad Company; the Pittsburg & Western Railway Company; the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; the Terre Haute & Indianapolis Railroad Company; the Toledo,

Peoria & Western Railway Company; the Wabash Railroad Company, and each of them, commanding them to appear herein and answer under oath the allegations contained in the complaint aforesaid made against them in behalf of the United States of America, and also a temporary writ of injunction restraining, until the further order of the Court, the said defendants and each and every of them and their representatives, officers, agents and servants, and each and every of them, from acting under, enforcing or executing the said agreement or "Articles of Organization," and from operating their said railroads thereunder, and from further proceeding in any manner to carry the said agreement into effect and operation.

WALLACE MACFARLANE,
Attorney of the United States
For the Southern District of New York,
Solicitor and of Counsel for the United States,
P. O. Building, New York, N. Y.

UNITED STATES OF AMERICA,
Southern District of New York. } *ss.*

On this 8th day of January, 1896, personally appeared before me Wallace Macfarlane, who being duly sworn, says that he is Attorney of the United States for the Southern District of New York; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to such matters he believes the said complaint to be true.

WALLACE MACFARLANE.

Sworn to before me, this 8th day of January, 1896.

MAX J. KOHLER,
Notary Public,
N. Y. County.

Exhibit "A."

43

ARTICLES OF ORGANIZATION

OF THE

JOINT TRAFFIC ASSOCIATION.

Adopted Nov. 19, 1895.

To take effect January 1st. 1896.

INDEX.	ARTICLE.	PAGE.
Purposes of Agreement, Contracting Companies, and Title of Association.	Preamble.	1
Boards of Administration.	One.	1
Traffic Included and Excluded.	Two.	2
Board of Control—Its Powers, Provision for Additional Members, etc.	Three.	2
Board of Managers.	Four.	3
Managers' Rules, Applications for Differentials, Rates and Fares, etc.	Five.	3 & 4
Appointment of Commissioners.	Six.	4
Rates and Fares reaffirmed, their Observance, etc.	Seven.	4
Proportions of Competitive Traffic.	Eight.	4
Action as to Non-concurring Companies, Divisions of Rates and Fares, etc.	Nine.	5

44

45

INDEX.	ARTICLE.	PAGE.
Limitation of Powers of Freight Lines.	Ten.	5
Organization of Joint Agencies.	Eleven.	5
Managers to Approve Contracting Agencies.	Twelve.	5
Duties and Authority of Soliciting Agents.	Thirteen.	5
Complaints and Investigations.	Fourteen.	6
Reports and Information to be furnished.	Fifteen.	6
Violations of Agreement and Forfeitures.	Sixteen.	6
Deposits, Provision for Expense Fund, etc.	Seventeen.	6
Retirement from Agreement.	Eighteen.	6
Board of Arbitration.	Nineteen.	7
Amendments.	Twenty.	7
When Agreement Becomes Effective and its Duration.	Twenty-one.	7

49

PREAMBLE.

PURPOSES OF THIS AGREEMENT.

Purposes of this Agreement.

To aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and Interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service,

50

Parties to this Agreement.

The Allegheny Valley Railway Company,
Baltimore & Ohio Railroad Company,
Baltimore & Ohio Southwestern Railway Company,
Central Railroad Company of New Jersey,
Chesapeake & Ohio Railway Company,

51

Chicago & Erie Railroad Company,
Chicago & Grand Trunk Railway Company,
Cleveland, Cincinnati, Chicago & St. Louis Railway Company,
Delaware, Lackawanna & Western Railroad Company,
Detroit, Grand Haven & Milwaukee Railway Company,
Erie Railroad Company,

Grand Rapids & Indiana Railroad Company,
Grand Trunk Railway Company of Canada,
Lake Shore & Michigan Southern Railway Company,
Lehigh Valley Railroad Company,
Michigan Central Railroad Company,
New York Central & Hudson River Railroad Company,
New York, Chicago & St. Louis Railroad Company,
New York, Ontario & Western Railway Company,
Northern Central Railway Company,
Pennsylvania Company,
Pennsylvania Railroad Company,
Philadelphia & Reading Railroad Company,
Philadelphia, Wilmington & Baltimore Railroad Company,
Pittsburg & Lake Erie Railroad Company,
Pittsburg & Western Railway Company,
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company,
Terre Haute & Indianapolis Railroad Company (Vandalia Line),
Toledo, Peoria & Western Railway Company,
Wabash Railroad Company,
West Shore Railroad Company,

do hereby constitute the Joint Traffic Association (hereinafter called The Association), Name of Association.

and make this agreement for the pur-

pose of carrying out the objects above named.

Additional Members.

41 Other companies may become members of The Association as provided in Article Three.

42 ARTICLE ONE.

43 BOARDS OF ADMINISTRATION.

Boards of Administration and definition of terms used.

44 SECTION 1. The affairs of The Association shall be administered by three

45 Boards, with duties as hereinafter specified :

46 (*a*) A Board of control.

47 (*b*) A Board of Managers, hereinafter called The Managers.

48 (*c*) A Board of Arbitration, hereinafter called The Arbitrators.

49 SECTION 2. Wherever the term traffic is used herein it means both freight and

50 passenger traffic.

1 ARTICLE TWO.

2 TRAFFIC SUBJECT TO THE ASSOCIATION.

* Traffic included.

3 SECTION 1. The Association shall have jurisdiction over all competitive traffic

4 (subject to the exceptions noted in Section 2 of this Article) which passes to, from or

5 through the Western termini of the Trunk Lines, viz.: Toronto, Can.; Suspension Bridge,

6 Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction,

Dunkirk and Salamanca, N. Y.; Erie, Pittsburg and Allegheny, Pa.; Bellaire, O.;
Wheeling, Parkersburg, Charleston and Kenova, W. Va.; and Ashland, Ky.; and such
other points as may hereafter be designated by The Managers as such termini; also all
traffic which may pass through other junctions of the companies parties hereto which is
included when passing through any of the termini or junctions above or hereafter
specified, and such other traffic as may by common consent of the parties be hereafter
included herein.

SECTION 2. The following shall not be included: **Traffic Excluded.**

(*a*) Coal, coke, iron ore, mill cinder, limestone and petroleum, crude or refined.

(*b*) Traffic destined to or coming from Florida, Georgia, North and South Carolina, Virginia and West Virginia south of the south line of the Chesapeake & Ohio Railway.

ARTICLE THREE.

THE BOARD OF CONTROL.

SECTION 1. The Presidents of the companies forming The Association and of such other companies as may become par- **Board of Control.**

ties hereto, shall constitute the Board of Control, 61

which shall meet on the written request of any three of its members.

Representation at Meetings.

SECTION 2. In case of the absence of any member of The Board of Control from a meeting the next ranking officer in such company having jurisdiction over traffic will have authority to act in his place and stead.

Number of votes of each System. 62

SECTION 3. Each member of the Board of Control shall be entitled to one vote, except that no System as designated in Article Four shall have more than three votes in the aggregate.

Number of Votes to Decide.

It shall require three-fourths of the entire number of authorized votes to adopt any proposition coming before the Board of Control.

Compensation of Officers and Employees. 63

SECTION 4. The Board of Control shall fix the salaries of any Commissioners appointed by The Managers. The salaries of other officers and employees of The Association shall be subject to its review and approval.

Board of Control to select Arbitrators

The Board of Control shall select The Arbitrators and fix their compensation and term of service.

64 38 SECTION 5. The Board of Control shall appoint an Auditing Committee, who shall — Auditing Committee.
39 examine and report to it upon the accounts of The Association.

40 SECTION 6. The Board of Control shall prescribe the conditions and rules under — Additional Members.
41 which additional railway systems or companies shall become parties hereto and be
42 represented upon the Board of Managers.

65
43 SECTION 7. Only The Board of Control shall consider appeals from the action of — Appeals from Managers as to Rates and Fares.
44 The Managers on all questions as to rates or fares, except differentials.

45 SECTION 8. Pending decisions by The Board of Control the decisions and orders
46 of The Managers shall prevail.

1 ARTICLE FOUR.

66 2 THE BOARD OF MANAGERS.

3 SECTION 1. The Board of Managers shall consist of not less than nine members, of — Board of Managers and the Systems they represent.
4 which each of the following nine systems shall designate one:
5 Baltimore & Ohio System, now comprising the Baltimore & Ohio Railroad line
6 from Philadelphia to Parkersburg and from Philadelphia to Chicago via

Wheeling and via Pittsburg and Connellsville; Baltimore & Ohio Southwestern; Cleveland Terminal & Valley, and the Pittsburg & Western Railroad Companies, and all their leased, controlled or operated lines. 67

Chesapeake & Ohio System, now comprising the Chesapeake & Ohio; Cleveland, Cincinnati, Chicago & St. Louis, and lines composing that system, and the Peoria & Eastern Railroad Companies, and all their leased, controlled or operated lines. 68

Erie System, now comprising the Erie Railroad Company; the Chicago & Erie Railroad Company, and all their leased, controlled or operated lines.

Grand Trunk System, now comprising the Grand Trunk Railway Company of Canada and its affiliations west of the St. Clair River, viz., the Chicago & Grand Trunk; Cincinnati, Saginaw & Mackinaw; Detroit, Grand Haven & Milwaukee; Michigan Air Line, and the Toledo, Saginaw & Muskegon Railway Companies, and all their leased, controlled or operated lines. 69

Lackawanna System, now comprising the Delaware, Lackawanna & Western Railroad Company and its leased lines;

Companies comprising the Systems.

and the Syracuse, Binghamton & New
York Railroad Company, and all their leased, controlled or operated lines.
Lehigh Valley System, now comprising the Lehigh Valley Railroad Company
and all its leased, controlled or operated lines.
Pennsylvania System, now comprising the Allegheny Valley; Cumberland Valley;
Cincinnati & Muskingum Valley; Grand Rapids & Indiana; Northern Cen-
tral; Pennsylvania; Pennsylvania Company; Philadelphia, Wilmington &
Baltimore; Pittsburg, Cincinnati, Chicago & St. Louis, and the Terre Haute
& Indianapolis (Vandalia Line) Railroad Companies, and all their leased, con-
trolled or operated lines.
Vanderbilt System, now comprising the Beech Creek; Canada Southern and its
leased lines; Dunkirk, Allegheny Valley & Pittsburg; Lake Shore &
Michigan Southern; Michigan Central and its leased lines; New York Central
& Hudson River; New York, Chicago & St. Louis; Pittsburg & Lake
Erie; Rome, Watertown & Ogdensburg; Walkill Valley, and the West

Shore Railroad Companies, and all their leased, controlled or operated lines. 73

Wabash System, now comprising the Wabash Railroad Company and all its leased,

controlled or operated lines east of the Mississippi River.

Additional Managers.

SECTION 2. Additional Managers representing other systems or companies which

are now or may hereafter become parties to this Agreement, may be designated as such 74

systems or companies under the authority and rules of The Board of Control.

Term of Office and Compensation.

SECTION 3. Each Manager shall hold office during the continuance of this Agree-

ment, subject to the pleasure of, and shall be compensated by, the system appointing

him.

ARTICLE FIVE. 75

RELATING TO THE DUTIES AND POWERS OF THE MANAGERS.

Managers' Office, Sessions, Chairman.

SECTION 1. The Managers shall have their principal office in New York City and

shall continue in session subject to their rules. They shall elect a Chairman annually.

76 50 SECTION 2. The Managers shall adopt their rules and perfect their organization. Rules of Managers and vote required to adopt.

51 It shall, however, require the affirmative votes of three-fourths of their entire number

52 to adopt any proposition coming before them.

1 SECTION 3. In considering questions which exceptionally affect the interests of Questions affecting Companies unrepresented by Managers.

2 any company party hereto unrepresented upon The Board of Man-

77 agers, such company

3 shall be advised thereof and be afforded an opportunity under the rules of The Mana-

4 gers for presenting to them its views before final action is taken.

5 SECTION 4. The Managers shall construe this Agreement and all resolutions Managers to construe Agreement.

6 adopted thereunder.

7 SECTION 5. All applications for differentials and for changes in rates, Appeals from Managers to Arbitrators and Board of Control.

78 fares,

8 charges and rules shall be made to The Managers. Their action upon differentials and

9 upon all questions except as to rates and fares shall be subject to appeal, but only to

10 The Arbitrators. Their action as to rates and fares (except differentials) shall be sub-

11 ject to appeal only to The Board of Control.

Decisions and orders of The Managers shall be complied with until such appeals are decided. 79

ARTICLE SIX.

APPOINTMENT OF COMMISSIONERS.

Appointment of Commissioners.

The Managers may appoint not more than three Commissioners and shall define their powers and duties.

80

ARTICLE SEVEN.

RATES, FARES, CHARGES AND RULES.

Re-affirmation of Rates, Fares, Charges and Rules.

SECTION 1. The duly published Schedules of rates, fares and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), are hereby re-affirmed by the companies composing The Association, and the companies parties hereto shall within ten days after this agreement becomes effective file with The Managers copies of all such schedules of rates, fares and charges and the rules applicable thereto. 81

Managers to Recommend Changes in Rates, Fares, etc.

82 27 SECTION 2. The Managers shall from time to time recommend such changes in said

28 rates, fares, charges and rules as may be reasonable and just, and necessary for govern-

29 ing the traffic covered by this Agreement and for protecting the interests of the parties

30 hereto therein, and the failure to observe such recommendations by any party hereto as

31 and when made shall be deemed a violation of this Agreement. No

83 company party

32 hereto shall through any of its officers or agents deviate from or change the rates, fares,

33 charges or rules herein re-affirmed or so recommended by The Managers, except by a

34 resolution of its Board. The action of such Board shall not affect the rates, fares,

35 charges or rules disapproved except to the extent of its interest therein over its own

84 36 road. A copy of the resolution of the Board of any company party hereto authorizing

37 any such change shall be immediately forwarded by the company making the same to

38 The Managers and such change shall not become effective until thirty days after the

39 receipt of such resolution by The Managers. The Managers, upon receiving such

notice, shall act promptly upon the same for the protection of the parties hereto. 85

SECTION 3. The powers conferred upon The Managers shall be so construed and

exercised as not to permit violation of the Interstate Commerce Act or any other law

applicable to the premises, or any provision of the charters or the laws applicable to any

of the companies parties hereto, and The Managers shall co-operate with the Interstate 86

Commerce Commission to secure stability and uniformity in the rates, fares, charges

and rules established hereunder.

Managers not to permit violations of law, and to co-operate with Interstate Commerce Commission.

ARTICLE EIGHT.

PROPORTIONS OF COMPETITIVE TRAFFIC.

The Managers are charged with the duty of securing to each company party

hereto, equitable proportions of the competitive traffic covered by this agreement so 87

far as can be legally done.

Proportions of Competitive Traffic.

ARTICLE NINE.

RELATIONS TO NON-CONCURRING COMPANIES AND REVISIONS OF RATES AND FARES.

SECTION 1. The Managers shall decide and enforce the course which shall be

Action as to Non-Concurring Companies.

pursued with connecting companies not parties to this Agreement, which fail or decline to observe the rates, fares, charges and rules established under this Agreement. The interests of companies parties hereto injuriously affected by such action of The Managers, shall in such instances, be accorded reasonable protection in so far as The Managers can legally do so.

Divisions of Rates and Fares.

SECTION 2. When in their judgment necessary to the purposes of this Agreement, The Managers may determine the divisions of rates and fares between connecting companies parties hereto and between them and connections not parties hereto, keeping in view uniformity and the equities involved.

ARTICLE TEN.

LIMITATION OF POWERS OF FREIGHT LINES.

Limitation of Powers of Freight Lines.

It is recognized and agreed that economy in the operation of through co-operative and commission freight lines and the limitation or termination of many of their existing powers and functions are absolutely required, and the companies parties hereto

will actively co-operate with The Managers and so manage such lines as to accomplish such results. 91

ARTICLE ELEVEN.

MANAGERS MAY ORGANIZE JOINT AGENCIES.

Organization of Joint Agencies.

The Managers shall have authority to organize such joint freight and passenger agencies as they may deem desirable, provided that if such joint agencies are established they shall be so arranged as will give proper representation to each company party hereto. 92

ARTICLE TWELVE.

MANAGERS TO APPROVE CONTRACTING AGENCIES.

Soliciting and Contracting Agencies.

No soliciting or contracting passenger or freight agency shall be maintained directly or indirectly by any of the companies parties hereto or by any freight line in connection with the traffic covered by this Agreement, except with the approval of The Managers, and no person who is decided by The Managers to be objectionable shall be employed or continued in such agency. 93

ARTICLE THIRTEEN.

MANAGERS TO DEFINE DUTIES OF CONTRACTING AGENTS.

Duties and Authority of Soliciting Agents.

SECTION 1. The Managers shall define the authority and duties of all persons acting as contracting and soliciting freight and passenger agents in relation to the traffic covered hereby, and, with due regard to the relative interests involved, they may determine the number of such persons to be employed. The parties hereto shall observe and enforce the orders of The Managers from time to time issued in that behalf.

Soliciting Agents on Association Pay-rolls.

SECTION 2. Such contracting and soliciting agents as The Managers appoint shall be carried upon the pay-rolls of The Association.

Grand Trunk Soliciting Agents in Canada.

SECTION 3. The Grand Trunk Company may appoint soliciting agents to be located at such points in Canada as may be necessary to meet the competition of Canadian lines not parties hereto, but such persons shall in all respects be subject to the rules of The Managers.

97

ARTICLE FOURTEEN.

COMPLAINTS AND INVESTIGATIONS THEREOF.

Investigations and Evidence to be furnished.

When in the judgment of The Managers their information or any complaint so warrants, the officials and employees of the companies parties hereto may be examined, and in such investigation any or all officials or employees may be notified to attend, and any or all matters affecting directly or indirectly the traffic herein covered may be considered.

98

ARTICLE FIFTEEN.

REPORTS AND DATA TO BE FURNISHED.

Parties hereto to furnish Reports, etc.

The companies parties hereto agree to furnish to The Managers all reports, papers and information relating to the traffic covered hereby, which may be requested by them.

99

ARTICLE SIXTEEN.

FORFEITURES FOR VIOLATIONS OF AGREEMENT.

Forfeitures for Violations.

For any action by any party hereto which in the judgment of The Managers constitues a violation of this Agreement the offending Company shall forfeit to The

Association a sum to be determined by The Managers, not exceeding five thousand dollars, but where the gross receipts of the transaction in which this Agreement is violated shall exceed five thousand dollars the offending party shall, at the discretion of The Managers, forfeit a sum not exceeding such gross receipts. Such forfeitures shall be applied to the payment of the expenses of The Association, except that the offending company shall not participate in such application of its own forfeiture.

ARTICLE SEVENTEEN.

DEPOSITS, EXPENSE FUND, AND PROVISION FOR FORFEITURES.

Provisions for Fund Expenses and Monthly Deposits.

SECTION 1. Upon the call of The Managers after this Agreement becomes effective, each company party hereto shall deposit with them the sum of five thousand dollars, and in addition thereto, upon their like call, such further sums monthly, based upon the gross earnings of each company party hereto from the traffic covered hereby, as The Managers may decide to be necessary to defray the expenses of The Association,

including the salaries of the Commissioners and Arbitrators, and to provide for such 103

forfeitures as may be adjudged.

Payment of Forfeitures

SECTION 2. Any forfeiture made by any company party hereto, under the rules,

shall be taken from the sums contributed by such company and charged in whole to its

account. If this deposit at the time, exclusive of its said original contribution of five

thousand dollars, shall be insufficient, 104 it shall pay to The Managers such deficiency

within fifteen days after the forfeiture is finally adjudged.

Distribution of Balance.

SECTION 3. The balance of said deposits remaining at the expiration of this

Agreement shall be divided between the companies then parties hereto in the ratio in

which they have contributed, less the amounts forfeited. 105

ARTICLE EIGHTEEN.

RETIREMENT FROM THE AGREEMENT.

Retirement from Agreement.

Any party retiring from this Agreement before the final completion of the time

herein fixed, except by unanimous consent of the parties hereto, shall not be entitled to

any refund from the residue of deposits remaining at the close of this Agreement, but if any company fails to observe and be governed by this Agreement, which fact shall be determined by The Arbitrators, and then fails to pay its forfeitures within fifteen days after such decision of The Arbitrators, then any other company may withdraw from this Agreement upon giving thirty days written notice to The Managers and such company so withdrawing shall be entitled to the residue of the funds it has contributed.

ARTICLE NINETEEN.

BOARD OF ARBITRATION.

Board of Arbitration

SECTION 1. There shall be a permanent Board of Arbitration consisting of three disinterested persons to which appeals shall be made as to all questions, including differentials, arising under this Agreement, except the determination of rates and fares.

All Differences to be Arbitrated.

SECTION 2. All differences between the parties hereto as to any lawful measure necessary to carry out the objects of The Association, except as to rates and fares

shall be submitted to and be finally decided by The Arbitrators.

Managers' Decision to prevail pending Arbitration

SECTION 3. Pending decisions of The Arbitrators the decisions and orders of the Board of Control and Managers shall prevail.

Hearings by the Arbitrators

SECTION 4. Hearings shall be had upon all questions arbitrated, under the rules established by The Arbitrators and approved by The Board of Control and the decision of The Arbitrators or of any two of them shall be final.

ARTICLE TWENTY.

AMENDMENTS.

Amendments.

Amendments to this Agreement shall only be made by the unanimous vote of the parties hereto.

ARTICLE TWENTY-ONE.

WHEN AGREEMENT BECOMES EFFECTIVE AND ITS DURATION.

When Agreement takes Effect.

SECTION 1. This Agreement shall not be effective until it shall have been approved by the Boards of Directors of the several companies parties hereto. Certified copies of resolutions giving such approval shall be filed with The Managers.

112 23 SECTION 2. This Agreement shall take effect January 1st, 1896, and shall con- **Duration of Agreement.**

24 tinue in existence for five years thereafter. After said period, any company may retire

25 therefrom upon giving ninety days written notice of its desire to do so.

---

26 The Philadelphia & Reading Rail- **Status of Phila. and Reading Railroad.**

113 road Company being legally incapacitated from

27 signing this contract at present, but having so far as it can do so indicated

28 through its President and Receivers and proposed Reorganization Committee its

29 desire to act in harmony therewith and observe its terms, it is understood that the

30 parties hereto will waive the signature of that company until it is reorganized; and

114 31 be bound by this Agreement only so long as that company observes its conditions,

32 which fact shall be determined by The Arbitrators provided herein.

IN WITNESS WHEREOF, the corporations, parties hereto, have caused the foregoing Agreement to be signed by their respective Presidents and the Seal of their respective corporations to be attached hereto.

ALLEGHENY VALLEY RAILWAY COMPANY.

(L.S.) W. H. Barnes, President.

THE BALTIMORE & OHIO RAILROAD COMPANY.

(L.S.) By Charles F. Mayer, President.
Attest, Andrew Anderson, Secretary.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

(L.S.) By Edward R. Bacon, its President.
Attest, Edward Bruce, Secretary.

CENTRAL RAILROAD CO. OF NEW JERSEY.

(L.S.) J. R. Maxwell, President.
Attest, Sam'l Knox, Secretary.

CHESAPEAKE & OHIO RAILWAY CO.

(L.S.) By M. E. Ingalls, President.

THE CHICAGO & ERIE RAILROAD COMPANY.

(L.S.) By J. G. McCullough, President.

THE CHICAGO & GRAND TRUNK RY. CO.

(L.S.) By L. J. Seargeant, its President.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO.

(L.S.) By M. E. Ingalls, President.

THE PEORIA & EASTERN RY. CO.

(L.S.) By M. E. Ingalls, President.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

(L.S.) By Sam. Sloan, President.
Attest, Fred. F. Chambers, Secretary.

118 THE DETROIT, GRAND HAVEN & MILWAUKEE RY. COMPANY.

(L.S.) By L. J. Seargeant, its President.

ERIE RAILROAD CO.

(L.S.) E. B. Thomas, President.

THE GRAND RAPIDS & INDIANA RAILROAD COMPANY.

(L.S.) By J. H. P. Hughart, Second Vice-President.
Attest, R. R. Metheany, Secretary.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

(L.S.) By L. J. Seargeant, its General Manager.

119 THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

(L.S.) By D. W. Caldwell, President.
Attest, N. Bartlett, Ass't Secretary.

LEHIGH VALLEY R. R. CO.

(L.S.) E. P. Wilbur, President.
Attest, Jno. R. Fanshawe, Secretary.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

(L.S.) By H. B. Ledyard, President.
Attest, E. D. Worcester, Secretary.

THE NEW YORK CENTRAL & HUDSON RIVER
120 RAILROAD COMPANY.

(L.S.) By Chauncey M. Depew, President.
Attest, E. D. Worcester, Secretary.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.

(L.S.) By S. R. Callaway, its President.
Attest, Allyn Cox, Secretary.

NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY.

(L.S.) By T. P. Fowler, President.
Attest, R. D. Rickard, Secretary.

THE NORTHERN CENTRAL RAILWAY COMPANY. 121

(L.S.) By G. B. Roberts, President.
Attest, Stephen W. White, Secretary.

PENNSYLVANIA COMPANY.

(L.S.) By G. B. Roberts, President.
Attest, S. B. Liggett, Secretary.

THE PENNSYLVANIA RAILROAD COMPANY.

(L.S.) By G. B. Roberts, President.
Attest, J. C. Sims, Secretary.

THE PHILADELPHIA & READING RAILROAD COMPANY.

By action of its Receivers and Board of Managers, pursuant to the last clause of this Agreement and duly filed. See Attached copy. F. H. H. 122

THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY.

(L.S.) By G. B. Roberts, President.
Attest, D. S. Newhall, Assistant Secretary.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

(L.S.) By D. W. Caldwell, President.
Attest, John G. Robinson, Secretary.

THE PITTSBURG & WESTERN RAILWAY COMPANY. 123

(L.S.) By Thos. M. King, President.
Attest, T. J. Crump, Secretary.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

(L.S.) By G. B. Roberts, President.
Attest, S. B. Liggett, Secretary.

TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.

(L.S.) By W. R. McKeen, President.
Attest, Geo. E. Farrington, Secretary.

124 THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY.

(L.S.) By E. F. Leonard, President.
Attest, E. D. Usner, Secretary.

THE WABASH RAILROAD CO.

(L.S.) By O. D. Ashley, President.
Attest, J. C. Otteson, Secretary.

THE WEST SHORE RAILROAD COMPANY.

(L.S.) By Chauncey M. Depew, President.
Attest, E. V. W. Rossitter, Secretary.

A true copy of the original on file in the office of
125 the Joint Traffic Association, 143 Liberty St., New York City.

FRANK H. HOYT,
Secretary.

Sworn to before me, this 23rd day of Dec., 1895.

JAMES H. REILLY,
Notary Public,
N. Y. Co.

126

"The Receivers of the Philadelphia & Reading 127
Railroad Company, having duly considered the Articles of Organization of the Joint Traffic Association, now under discussion by the companies constituting the Trunk Line and Central Traffic Associations, approve the spirit and purpose thereof, and authorize Mr. Joseph S. Harris to express on our behalf our willingness to be governed by the terms thereof in the conduct of the competitive traffic to be transmitted over the lines of railroad under our charge, so far as he may be advised by counsel that the same may be lawfully done. Also to agree in our behalf to contribute towards the expenses of the maintenance of the Joint Traffic Association such amounts as shall 128
not exceed the rate of contribution hitherto made by us for the maintenance of the Trunk Line Association."

I hereby certify that the foregoing is a true and correct extract from the minutes of the meeting of the Receivers of the Philadelphia and Reading Railroad Company, held October 28, 1895.

(Signed) W. R. TAYLOR,
Secretary to the Receivers.

"Mr. Harris stated to the Receivers the substance of the conference held yesterday in New York with the representatives of the companies, who are about 129
to form the Joint Traffic Association, and read the modification of the Second Section of the Fifth Article which had been agreed upon entitling this company to a hearing before any action by The Managers should become effective in cases exceptionally affecting the interests of the Reading Company. After full consideration Mr. Harris' action was approved, and he was authorized to state that the conduct of the competitive traffic to be transmitted over the lines of the Reading Railroad Company shall be governed by the terms of the proposed Agreement so far as he may be advised by counsel that the same may be lawfully done."

130 I hereby certify that the foregoing is a true and correct extract from the minutes of the meeting of the Receivers of the Philadelphia and Reading Railroad Company, held November 20, 1895.

(Signed) W. R. TAYLOR,
Secretary to the Receivers.

"The President reported that after the passage of the resolutions of the Board at their meeting of October 29th, at a meeting of the Committee in charge of the preparation of the Articles of Organization of the Joint Traffic Association, and afterwards at the meeting of the Presidents of the Trunk
131 Line Association and the Central Traffic Association, on November 19th, he had carefully stated the action which the Company and the Receivers were prepared to take in relation to the Joint Traffic Association. After considerable discussion of the proposed exceptional relations of the Reading Railroad Company to the Joint Traffic Association, the Presidents' meeting agreed that the Reading's position should be recognized and the action authorized by the Receivers and the Company should be taken as a sufficient indication of their purpose to act in harmony with the other transporting companies. A number of verbal alterations, mostly made for the purpose of bringing the organization more thoroughly into harmony with
132 the existing laws, but none of them involving changes of importance, had been made in the Articles of Organization since it was last presented to this Board. The President had urged upon the meeting that some provision should be made to better care for the interests of Companies unrepresented in the Board of Managers, in regard to questions exceptionally affecting their interests which should come before that Board, and had obtained the insertion of Section Three, Article Six, which gives to such Companies the right to be heard before the Board of Managers on questions which exceptionally affect their interests.

The President laid the Articles of Organization, as finally adopted at the meeting of November 19th, before the Board, and stated in detail the main features of the Articles, whereupon it was, upon motion, 133

Resolved, That the Board approves of the spirit and purpose of the Joint Traffic Association as expressed in the formal contract now presented, and requests the Receivers to act in harmony with the provisions of the Agreement, dated November 19, 1895, constituting that Association, so far as they may be advised by counsel that the same may be lawfully done."

I hereby certify that the foregoing is a true and correct extract from the minutes of the meeting of the Board of Managers of the Philadelphia & Reading Railroad Company, held December 11, 1895. 134

. . . . . (Signed) W. R. TAYLOR,
: SEAL. : Secretary.
. . . . . .

A true copy of the original on file in the office of the Joint Traffic Association, 143 Liberty Street, New York City.

F. H. HOYT,
Secretary.

Sworn to before me, this 23d day of Dec., 1895. } 135

. . . . . JAS. H. REILLY,
: SEAL. : Notary Public,
. . . . . N. Y. Co.

(Endorsed):—United States Circuit Court, Southern District of New York. In Equity.—The United States of America, vs. The Joint Traffic Association, The New York Central & Hudson River Railroad Company and others.—Bill of Complaint.—Wallace Macfarlane, U. S. Attorney, P. O. Building, New York City.—U. S. Circuit Court, Filed Jan. 9, 1896.—John A. Shields, Clerk.

136 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA, against THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, THE WEST SHORE RAILROAD COMPANY 137 and others.	In Equity.

On the annexed affidavit of Wallace Macfarlane, verified herein on the 9th day of March, 1896, it is

Ordered, that the plaintiffs in the above entitled suit have leave to amend their bill of complaint by filing the proposed amendment attached to said affidavit.

That a copy of said amendment be served upon such defendants as have appeared in the said suit.

E. HENRY LACOMBE,
U. S. Circuit Judge.

138

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

against

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, THE WEST SHORE RAILROAD COMPANY and others.

In Equity.

140

UNITED STATES OF AMERICA,
Southern District of New York. } *ss.*

WALLACE MACFARLANE, being duly sworn, says that he is the United States Attorney for the Southern District of New York; that a bill of complaint herein was filed on the 8th day of January, 1896; that copies thereof have been served; that none of the defendants have as yet filed their answers to said bill; that deponent desires to file an amendment to said bill of complaint, and that a copy of said proposed amendment is hereto annexed.

141

WALLACE MACFARLANE.

Sworn to before me this 9th day of March, 1896.

MAX J. KOHLER,
Notary Public,
N. Y. Co.

142 UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

THE UNITED STATES OF AMERICA,

against

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, THE WEST
143 SHORE RAILROAD COMPANY and others.

AMENDMENT TO BILL OF COMPLAINT.

(Filed March 9th, 1896.)

Insert at the end of folio 11 in said bill and prior to folio 12 the following allegation:

That heretofore and on or about December 26th, 1895, the Interstate Commerce Commission notified the Attorney General of the United States that the commission considered the contract, agreement
144 or arrangement hereinafter referred to as Exhibit "A" and entitled "Articles of Organization of the Joint Traffic Association" to be in conflict with the Act to regulate commerce, etc. (said Act being an Act passed February 4th, 1887, and amended by the Acts of March 2nd, 1889, February 10th, 1891, and February 8th, 1895), and requested the said Attorney General to direct the United States Attorney for the Southern District of New York to institute in the proper court and to prosecute under the direction of said Attorney General all necessary proceedings by way of injunction or otherwise to prevent the carrying into effect of said contract, agree-

ment or arrangement as contemplated, and to pre- 145
vent any violation of said Act to regulate commerce by reason of said contract, agreement or arrangement.

And the said Attorney General did thereupon direct the said United States Attorney for the Southern District of New York to institute all necessary proceedings to prevent the parties to said agreement from carrying the same into effect and to have the said agreement declared null and void, both on the ground that said agreement appeared to be in violation of the provisions of the said Act to regulate commerce as amended, and also in violation of the Act of July 2nd, 1890, entitled "*An Act to Protect Trade and Commerce Against Unlawful Re-* 146
straints and Monopolies," and on all other grounds (if any) by reason of which the said agreement was contrary to law and in violation of the rights of the citizens of the United States.

(Endorsed):—U. S. Circuit Court, Southern District of New York.—United States versus The Joint Traffic Association, The New York Central & Hudson River Railroad Company, The West Shore Railroad Company and others,—Amendment to Bill of Complaint.—Wallace Macfarlane, United States Attorney, Attorney for Plaintiff.—U. S. Circuit Court. Filed March 9. 1896.—John A. Shields, Clerk.

147

148 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, et al.

149

The Clerk of this Court will please enter an appearance in this cause as solicitors for the defendant, The Joint Traffic Association, without prejudice to our right to move to have the name of said The Joint Traffic Association stricken from the record as having been improperly made a party defendant.

Dated, New York, Feby., 3, 1896.

CARTER & LEDYARD,
Solicitors for Defendant,
THE JOINT TRAFFIC ASSOCIATION,
appearing as above.

150

To
JOHN A. SHIELDS, Esq.,
Clerk.

(Endorsed):—U. S. Circuit Court, Southern Dist. of New York.—The United States of America vs. The Joint Traffic Association, The New York Central & Hudson River Railroad Company, et al.—Precept to Enter Appearance.—Carter & Ledyard, Solicitors for the Defendant, The Joint Traffic Association, 54 Wall St., N. Y.—U. S. Circuit Court, Filed Feb. 3, 1896.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES 151

For the Southern District of New York.

The United States of America,

against

The Joint Traffic Association, The New York Central & Hudson River Railroad Company, et al.

In Equity.

152

To

John A. Shields, Esq.,
Clerk of the Circuit Court of the United States
For the Southern District of New York.

Sir:—

Please enter my appearance in the above entitled suit as the solicitor for the defendant, The New York Central & Hudson River Railroad Company.

Dated, February 3, 1896.

Frank Loomis,
Office and P. O. Address, Room 9,
Offices of The N. Y. C. & H. R. R. Co.,
Grand Central Depot, 153
42nd Street and 4th Avenue,
New York.

(Endorsed):—Circuit Court of the United States for the Southern District of New York. In Equity.—The United States of America agst. The Joint Traffic Association, The New York Central & Hudson River Railroad Company, et al.—Notice to Clerk to Enter Appearance. February 3, 1896.—Frank Loomis, Solicitor for The N. Y. C. & H. R. R. Co.—U. S. Circuit Court, Filed February 3, 1896.—John A. Shields, Clerk.

154 IN CIRCUIT COURT,

SOUTHERN DIST. OF N. Y.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, et al.

To

155 The Clerk of the Circuit Court, Southern District of New York.

Please enter my appearance as solicitor for the Lake Shore & Michigan Southern Railway Company and the Pittsburg & Lake Erie Railroad Company.

GEO. C. GREENE,
Solr. for L. S. & M. S. Ry. Co. &
P. & L. E. Rd. Co..
176 North St.,
Buffalo, N. Y.

Dated, N. Y., Feb. 3, 1896.

156 (Endorsed):—U. S. Circuit Court, Southern District of New York.—The United States vs. The Joint Traffic Association.—Appearance of Lake Shore & Michigan Southern Railway Company and the Pittsburg & Lake Erie Railroad Company.—Geo. C. Greene, Defts. Solr.—U. S. Circuit Court, Filed Feb. 3, 1896.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 157

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE PENNSYLVANIA RAILROAD COMPANY and others.

In Equity.

158

The Clerk of the above entitled Court will please enter my appearance as solicitor for the Pennsylvania Railroad Company only in the above entitled cause.

Dated, New York, February 3, 1896.

HENRY G. WARD,
Solicitor for Pennsylvania R. R. Co.,
No. 160 Broadway, N. Y.

(Endorsed):—United Sates Circuit Court, S. D. N. Y.—The United States of America against The Joint Traffic Association, The Pennsylvania Railroad Company and others.—Notice of Appearance.—Henry G. Ward, Solicitor for Pennsylvania Company, 160 Broadway, New York.—U. S. Circuit Court. Filed Feb. 3, 1896. —John A. Shields, Clerk. 159

160 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA

vs.

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, LEHIGH VALLEY RAILROAD COMPANY and others. } In Equity.

161

To

JOHN A. SHIELDS, Esq.,
Clerk of the United States Circuit Court
For the Southern District of New York.

You will please enter our appearance for the defendant, Lehigh Valley Railroad Company, in the above entitled suit.

Dated, New York, February 3rd, 1896.

Yours, &c.,

162

ALEXANDER & GREEN,
Solicitors for Defendant,
Office & P. O. Address, 120 Broadway,
New York City, N. Y.

(Endorsed):—U. S. Circuit Court, Southern Dist. of New York.—The U. S. of America v. Joint Traffic Assn.—Precept to Enter Appearance for Deft. Lehigh Valley R. R.—Alexander & Green, Solrs. for Deft. L. V. R. R., 120 Broadway, N. Y. City.—U. S. Circuit Court, Filed Feb. 3, 1896.—John A. Shields, Clerk.

U. S. CIRCUIT COURT, 163

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, et al.

Notice of Appearance.

Please take notice that we are retained and appear in this action as attorneys for the defendants, 164
Chesapeake & Ohio Railway Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Erie Railroad Company and Chicago & Erie Railroad Company, and demand that a copy of the complaint and all papers in this action be served on us at our office, number 15 Broad Street, New York City, New York.

Dated, New York, January 15th, 1896.

STETSON, TRACY, JENNINGS & RUSSELL,
Office and Post Office Address,
15 Broad Street, New York City,
New York,
Attorneys for Defendants. 165

To
WALLACE MACFARLANE, Esq.,
U. S. District Attorney,
Attorney for Plaintiff,
Post Office Building,
New York City.

(Endorsed):—U. S. Circuit Court, Southern District of N. Y.—The United States of America vs. The Joint Traffic Association, et al.—Notice of Appearance.—Stetson, Tracy, Jennings & Russell, 15 Broad Street, N. Y. City, Attorneys for Defendants.—U. S. Circuit Court, Filed Feb. 3, 1896.—John A. Shields, Clerk.

166 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, against THE JOINT TRAFFIC ASSOCIATION and others.	In Equity.

To the

Clerk of the Circuit Court of the United States
For the Southern District of New York.

167 Sir:—

You will please enter my appearance as solicitor for the following named defendants, to wit:

The West Shore Railroad Company,
The New York, Ontario & Western Railway Company,
The Michigan Central Railroad Company,
The New York, Chicago & St. Louis Railroad Company,
The Grand Trunk Railway Company of Canada,
The Chicago & Grand Trunk Railway Company, and
The Detroit, Grand Haven & Milwaukee Railway Company.

168 Dated, February 3, 1896.

ASHBEL GREEN,
Solicitor for the above named Companies,
Office and P. O. Address,
No. 5 Vanderbilt Avenue,
New York City.

(Endorsed):—U. S. Circuit Court, Southern District of New York.—United States of America vs. The Joint Traffic Association, et al.—Notice of Appearance.—Ashbel Green, 5 Vanderbilt Ave., N. Y. City, Attorney for Defendants.—U. S. Circuit Court, Filed Feb. 3, 1896.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT. 169

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

THE UNITED STATES OF AMERICA

Plaintiff,

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, impleaded with THE JOINT TRAFFIC ASSOCIATION and others.

Defendants.

Notice of Appearance.

170

Sir:—

Please take notice that the defendant, the Central Railroad Company of New Jersey, hereby appears in the above entitled action, and that we are retained as attorneys for

therein, and hereby demand that copies of all papers in this action be served on us at our office, number 62 William Street, New York City, N. Y.

Dated, February 14, 1896.

Yours, &c.,

DE FOREST BROTHERS,

Attorneys for Defendant,

Central Railroad Company of New Jersey. 171

Office and Post Office Address,

62 William St., N. Y. City.

To

WALLACE MACFARLANE, Esq.,

U. S. Attorney.

(Endorsed):—U. S. Circuit Court.—The United States of America, Plaintiff, against the Central Railroad Company of New Jersey, impleaded with the Joint Traffic Association and others, Defendant.—Notice of Appearance of Defendant, C. R. R. Co. of N. J.—De Forest Brothers, Attorneys for Defendant, C. R. R. Co. of N. J.—U. S. Circuit Court, Filed Feb. 14, 1896.—John A. Shields, Clerk.

172 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY and others.

173

Please enter my appearance in the above cause for the defendant, The Delaware, Lackawanna & Western Railroad Company.

Dated, New York, January 27th, 1896.

Yours, &c.,

HAMILTON ODELL,
Solicitor for the D., L. & W. R. R. Co.,
120 Broadway,
New York City.

To
JOHN A. SHIELDS, Esq.,
Clerk, &c.

174

(Endorsed):—United States Circuit Court, Southern District of New York. In Equity.—The United States of America vs. The Joint Traffic Association, The Delaware, Lackawanna & Western Railroad Company and others.—Notice of Appearance.—Hamilton Odell, Solicitor for the D., L. & W. R. R. Co., 120 Broadway, New York City.—U. S. Circuit Court, Filed Jan. 29, 1896.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES, 175

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA, vs. THE JOINT TRAFFIC ASSOCIATION and others.	In Equity.

The Clerk will please enter my appearance as solicitor for the following named respondents only 176
in the above entitled cause, viz:

Allegheny Valley Railway Company.
Northern Central Railway Company.
Pennsylvania Company.
Philadelphia, Wilmington & Baltimore Railroad Company.
Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company.
Terre Haute & Indianapolis Railroad Company.
Toledo, Peoria & Western Railway Company.
Grand Rapids & Indiana Railroad Company.

Dated, New York, February 13th, 1896.

177

HENRY G. WARD,
Solicitor for Defendants above named,
Office and Post Office Address,
160 Broadway, New York.

(Endorsed):—United States Circuit Court, S. D. N. Y.—The United States of America against The Joint Traffic Association and others.—Notice of Appearance.—Henry G. Ward, Solicitor for Defts., No. 160 Broadway, New York.—To Clerk, United States Circuit Court.—U. S. Circuit Court, Filed Feb. 13, 1896.—John A. Shields, Clerk.

178 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, et al.

} In Equity.

179

JOHN A. SHIELDS, Esq.,
Clerk, &c.

In the above entitled suit, please enter the appearance of the defendants, The Baltimore & Ohio Railroad Company, The Baltimore & Ohio Southwestern Railway Company and The Pittsburg & Western Railway Company, by the undersigned as solicitors.

E. G. D. CROSS,
HUGH L. BOND, Jr.,
Solicitors for Defendants.

180

(Endorsed):—United States Circuit Court, Southern District of New York.—United States of America vs. New York Central & Hudson River R. R. Co., et al.—Entry of Appearance for Baltimore & Ohio R. R. Co., et al.—U. S. Circuit Court, Filed Feb. 13, 1896.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 181

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., THE WABASH RAILROAD COMPANY and others. } In Equity. 182

Now comes the Wabash Railroad Company, defendant in the above entitled cause, by Wells H. Blodgett and Clarence D. Ashley, its attorneys, and enters its appearance as a defendant therein.

THE WABASH RAILROAD COMPANY,

By WELLS H. BLODGETT,
CLARENCE D. ASHLEY,
Attorneys,
207 Broadway.

183 (Endorsed):—United States Circuit Court, Southern District of New York.—United States of America vs. The Joint Traffic Association, The New York Central & Hudson River Railroad Co., The Wabash Railroad Co. and others.—Appearance of the Wabash Railroad Co.—U. S. Circuit Court, Filed Feb. 14, 1896.—John A. Shields, Clerk.

184 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY
185 COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY;
186 THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY; THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY,
Defendants.

ANSWER OF DEFENDANT, The Joint Traffic Association.

The answer of THE JOINT TRAFFIC ASSOCIATION, one of the defendants in the above-entitled suit to the bill of complaint of the United States of America, complainant therein.

This defendant, now and at all times hereafter 187
saving and reserving to itself all and all manner of benefit, exception or advantages which can or may be had or taken to the many errors, uncertainties, insufficiencies or other imperfections, in the said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is or are necessary or material for it to make answer to, answering says:

I. That it admits:

That the several railroad companies, defendants herein, are incorporated as in said bill of complaint alleged.

That The Joint Traffic Association is a voluntary 188
association organized under certain "Articles of Organization," entered into and executed by the said several railroad and railway companies, on or about the nineteenth day of November, 1895, a copy of which is annexed to the said bill of complaint as Exhibit A, and that the principal place of business of said Joint Traffic Association is in the City of New York, in the Southern District of New York; but this defendant avers that the said Joint Traffic Association is not incorporated, is not a common carrier and is not engaged in the transportation of freight or passengers.

189

II.—This defendant further admits that all of said corporations defendant are common carriers and as such, at all the days and times mentioned in the bill of complaint and prior thereto, were and now are engaged in the transportation of freight and passengers, either separately or in connection with each other, continuously carried on among the several States of the United States, and among and between the several States of the United States and the Territories thereof, and between such States and Territories and foreign countries, and from places in the United States through foreign countries to other places in the United States.

190 But this defendant denies that any or either of said corporations have ever been otherwise engaged in interstate commerce, or that they, or any or either of them, have ever been engaged in any trade in or in relation to any article or commodity in anywise embraced within the operation or scope of said agreement.

III.—This defendant further admits that prior to the 19th day of November, 1895, the several railroad companies constituting what are termed in said agreement respectively the Baltimore and Ohio, the Chesapeake and Ohio, the Erie, the Grand Trunk, the Lackawanna, the Lehigh Valley, the
191 Pennsylvania, the Vanderbilt and the Wabash systems, with their leased, controlled, or operated lines, owned, operated and controlled separate railroad lines or systems, engaged with their connections independently in commerce among the States and Territories of the United States and with foreign nations and were in active competition with each other for such traffic, both in freight and passengers, and furnished to all persons engaged in such traffic or travel among the States and Territories of the United States separate and independent and competing lines of transportation in respect to the traffic in said bill mentioned; and this defendant avers that ever since the said 19th day of
192 November, 1895, the said railroad companies have continued to own, operate and control the same separate railroad lines or systems, engaged with their connections independently in said commerce, and that they have ever since continued to be and still are in active competition with each other for such traffic, and have ever since furnished and still continue to furnish to all persons engaged in such traffic or travel the same separate and independent and competing lines of transportation in respect to the traffic in said bill mentioned.

IV.—This defendant further admits and answers 193
that on or about the 19th day of November, 1895, the said railroad companies entered, as they were and are advised and believe they had a lawful right to do, into the certain contract, in the form of a written document, entitled "Articles of Organization of the Joint Traffic Association" hereinbefore mentioned.

But this defendant denies that the said contract is an unlawful contract in any of its provisions, or that it is or was intended to be a contract, agreement, combination or conspiracy to restrain trade or commeree among the several States, or was or is an attempt to monopolize, or does or will operate to monopolize, such trade or commerce, or is or was 194
intended to restrain or prevent legitimate competition among such railroads in respect to any inter-state trade or commerce, or does in any way restrain or prevent legitimate competition among said railroads in respect to any of such trade or commerce, or that the said companies or any or either of them in entering into said contract or at any time contrived or intended, or now intend to deprive the public, or have deprived the public engaged in any inter-state trade or transportation of any facilities or advantages which the said public theretofore had lawfully enjoyed from any independent competition of said railroads, or any or either of them, in respect to the traffic described in the bill of 195
complaint, or that the said companies, or any or either of them, at any time intended or now intend to establish or maintain rates of freight or passenger transportation fixed arbitrarily or uninfluenced by competition in respect to any traffic whatever; or that the effect of the said agreement is to establish or maintain rates of freight or passenger transportation fixed arbitrarily, or uninfluenced by competition in respect to any traffic whatever.

V.—This defendant admits that the said agreement establishes a Board of Managers consisting

196 of representatives of a number of the railroad companies or systems parties thereto, and that the agreement confers upon said Board of Managers the powers set forth in the said agreement, Exhibit A, annexed to the bill of complaint, for the provisions of which agreement this defendant begs leave to refer to the same. And this defendant denies each and every allegation of the bill of complaint imputing to the said agreement, or to the parties thereto any other agreement or intent than such as appears on the face thereof, and denies that the said Board of Managers, or any member thereof, has any power in regard to the subject matter embraced in the said agreement except as is
197 specifically granted to the said Board of Managers and the members thereof by the terms of the said agreement.

And this defendant denies that the said agreement confers upon the Board of Managers any right or authority to establish rates, fares, charges or rules for governing the traffic within the scope of the agreement.

VI.—This defendant further answering, denies that by the said agreement, or otherwise, the said companies, or any or either of them, surrendered to the said association any traffic whatever; or that it was or is the intention of said companies, or any or
198 either of them, or that it is or will be the effect of said agreement, to surrender to said association any traffic whatever.

VII.—This defendant admits that the traffic passing from, to or through the western termini of the trunk lines referred to in the said agreement constitutes a considerable and important part of all the freight and passenger traffic carried on between the several States and Territories of the United States, and between them and adjacent foreign countries, and that prior to the time when the said agreement went into effect the said rail-

road companies and systems, or many of them, 199
were in competition with each other for said traffic; but this defendant denies that such competition as conducted prior to the time when said agreement went into effect, resulted in advantage to the public engaged in such traffic or to the benefit or advantage of the people of the United States. And this defendant denies that said agreement was or is an oppressive or unlawful contract, agreement, combination or conspiracy.

VIII.—This defendant denies that in and by the terms of the said agreement attached to the bill of complaint, "Exhibit A," the said railroad companies, parties thereto, with the purpose of ter- 200
minating all or any competition among themselves for the freight and passenger traffic aforesaid, or for any purpose, unlawfully or otherwise, agreed to surrender the control of such traffic to the Board of Managers created by the terms of the said agreement, or agreed to terminate existing through cooperative or commission freight lines, although this defendant answers and admits that said companies, without any unlawful purpose, but as they were advised and believed and still are advised and believe they lawfully might do, agreed, for reasons of economy, to limit or terminate some or many of the powers or functions of existing through co-operative and commission freight lines, and, 201
except with the approval of the managers, to abandon all agencies for soliciting or contracting for any of the freight or passenger traffic within the scope of the said agreement, and to vest in the said Board of Managers full authority to organize joint freight and passenger agencies, as they might deem desirable; and that each and every of the said companies, in and by the said agreement, as they were advised and believed and still are advised and believe they lawfully might do, agreed not to maintain, directly or indirectly, in respect to the traffic covered by said agreement, any freight or

202 passenger agency except with the approval of the said Board of Managers, and to employ nobody in soliciting or contracting for any of such traffic to whom the said Board of Managers should object; but this defendant denies that the said companies, or any or either of them, in and by the said agreement or otherwise, surrendered to the said Board of Managers full or absolute control over all or any of the said competitive interstate traffic or commerce within the scope of said agreement, and this defendant avers that the sole purpose of the parties to the agreement in inserting the provisions therein contained relative to freight lines and agencies was, so far as they lawfully might, to prevent
203 illegitimate and ruinous competition, and the payment of rebates and commissions and the use of other subterfuges and secret practices which would result in unjust discriminations as between shippers and detriment to the public.

IX.—This defendant denies that in and by the said agreement the said companies, or any of them, unlawfully or in restraint of trade or commerce among the several States, or otherwise, agreed that the said Board of Managers should divide the said competitive traffic among the railroad companies, parties to the said agreement, in such proportions as the said Board of Managers should determine,
204 or that full control of any of the aforesaid competitive traffic was surrendered or entrusted by the terms of said agreement to the said Board of Managers; but this defendant admits that by said agreement it was provided that the Managers should be charged with the duty of securing to each of the companies parties thereto equitable proportions of the competitive traffic covered by said agreement so far as might be legally done; and this defendant denies that the said agreement unlawfully or otherwise combined a large or any part of the freight business of the said several competing railroads or railroad systems, or unlaw-

fully restrained or prevented competition among 205
the said railroads, or any or either of them in respect to any competitive traffic, or unlawfully restrained trade or commerce among the several States and Territories of the United States, or unlawfully or otherwise attempted to monopolize any part of such interstate trade or commerce.

X.—This defendant denies that the several railroad companies or systems, parties to the said agreement, or any or either of them, in or by the said agreement or otherwise, agreed that the Board of Managers created by said agreement and thereby charged with the execution thereof, should have power to establish the rates, fares or charges 206
for carrying such interstate traffic, either freight or passenger.

This defendant admits that the said agreement conferred upon said Board of Managers power to determine, when in their judgment necessary, the divisions of rates, fares and charges between connecting companies, parties to said agreement, and so far as practicable, between companies parties to said agreement and other railroad companies connecting with the parties to said agreement or any of them, keeping in view uniformity and the equities involved.

But this defendant answers and avers that the power conferred upon the said Board of Managers 207
to determine the divisions of rates and fares between the several railroad companies was not a power conferred upon the Board of Managers to fix or determine rates for through traffic over connecting lines, but only to fix and determine the *pro rata* share or division of such established through rates or fares to be apportioned to the several railroad companies owning or operating the connecting railroads constituting such through lines.

And this defendant denies that in or by the said agreement the said companies or any or either of

208 them unlawfully, or in restraint of interstate trade or commerce or otherwise contracted, agreed or combined among themselves for the division between them of a portion of the earnings of the said several railroad companies, parties to the said agreement. And further denies that the said companies or systems, parties to said agreement, or any or either of them, had any purpose to restrain interstate trade or commerce by unlawfully or otherwise pooling or combining any part thereof, for which, prior to the date of the said agreement the said railroads or systems, or any or either of them, were actively or independently competing.

And this defendant further denies that the
209 unrestrained and illegitimate competition for interstate trade and commerce by the several railroad companies and systems which prevailed prior to the first day of January, eighteen hundred and ninety-six, and which in the said bill of complaint is erroneously styled active and independent competition, was to the advantage of the public or the United States in facilities, rates, fares or charges or otherwise.

XI.—This defendant denies that in and by said agreement the railroad companies and systems aforesaid, parties thereto, agreed that any failure to abide by the rates, fares and charges to govern the inter-
210 state traffic and commerce aforesaid, as recommended by the Board of Managers aforesaid, should be deemed a violation of said agreement or articles of organization. But this defendant avers that it was provided by the said agreement that the Managers should from time to time recommend such changes in said rates, fares, charges and rules as might be reasonable and just and necessary for the governing of the traffic covered by the said agreement and for protecting the interests therein of the parties to the said agreement, and that the failure to observe such recommendations by any party to the said agreement as and when made should

be deemed a violation of the said agreement, and 211
that the company or companies committing such violation should be subjected to the fines and penalties, in said agreement mentioned.

But this defendant avers that such provision of said agreement is subject to and is qualified and modified by other provisions of said agreement, under and by virtue of which any railroad company may, so far as concerns itself, by action of its Board of Directors, and upon timely and reasonable notice, disapprove, deviate from and change the rates, fares, charges, and rules so recommended, without subjecting such company to any fine or penalty.

And this defendant denies that there was 212
any oppressive or illegal purpose whatever in agreeing to any of the provisions of the said agreement, or that any of the provisions of the said agreement were unjust, oppressive or unlawful, or that there was inserted in the said agreement any provision, the purpose or intention of which was, or which has the effect, to combine the freight and divide the earnings of the said railroad companies, parties thereto, or any portion thereof, or in any respect to restrain or monopolize trade or commerce among the several States and Territories of the United States.

XII.—This defendant answering the allegations 213
of the bill of complaint as to the right of any company to retire from the association created by said agreement, and as to the duration of the said agreement, begs leave to refer to the provisions of said agreement in that behalf; and this defendant admits that it is provided in the said agreement that the Board of Managers, therein created and charged with the duty of executing the same, should have their principal office in the City of New York, in the Southern District of New York, and that the said Board of Managers has been organized under said agreement, and did at

214 the time of the filing of the bill herein consist of the persons in that behalf mentioned in said bill of complaint; and that the said railroad companies have put into full operation all the provisions of their said agreement and, through the Board of Managers and other officers, hold meetings in the City of New York and Southern District of New York, but denies that such acts, or any of them, are done with any unlawful purpose or in any respect operated to any detriment or disadvantage of the public, or are in violation of any of the laws of the United States.

XIII.—And this defendant further answering,
215 touching the matters and things alleged in the said bill of complaint, says: That the railroad systems of the United States, and in particular those parts of the same which are embraced under the operation of the agreement mentioned in the said bill, had grown into the condition in which they were at the time of the making of the said agreement, by a long and gradual process, in obedience, partly to the necessities of trade and commerce, and partly to the supply of capital and the display of enterprise in furnishing railroad facilities for such trade and commerce; that the great lines of railroad in the United States, and in particular the trunk lines constituting the systems mentioned
216 in said bill of complaint, had been made up of roads originally constructed for comparatively short distances, and afterwards, from time to time lengthened by additions, in some cases constructed by the same corporations by which the first roads were owned and in others by different corporations, and that the same had in like manner, from time to time, been enlarged and extended laterally and otherwise by new roads and extensions of roads, until the whole country had been covered by a network of lines which had, from time to time, by purchase, lease, merger, sale under the foreclosure of mortgages, and other methods of con-

solidation, been united under proprietorships very 217
few in number as compared with those constructing
and controlling the original parts; that the original
and separate roads were built from time to time in
response to the most pressing demands, because the
enterprise was promising and hopeful in point of
expected profit, and that the gradual consolida-
tion through the means above mentioned had been
shaped in accordance with the necessities arising
from the rapid growth of business, the building up
of towns and cities and the concentration of busi-
ness interests in the same; that originally trans-
portation for considerable distances could only be
had by successive dealings with different railroads
under different proprietorships and control, and so 218
required, to the great embarrassment of trade, fre-
quent changes of cars, by reason of difference in rail-
road gauge or refusal to interchange cars on roads of
equal gauges; that this embarrassment had become
aggravated by the circumstance that the tariffs of
rates were different upon different railroads and few,
if any, joint tariffs existed by which transportation
could be rapid, simple and convenient and the cost
thereof certain and known beforehand; that the dif-
ficulties and embarrassments thus encumbering the
trade and commerce of the country could be over-
come only as they had, in fact, been overcome, by the
consolidation of ownerships, or, where this was not
practicable, by conference, agreement and com- 219
munity of arrangement among the numerous inde-
pendent roads; that the trade and commerce of the
country absolutely required such conferences and
the making of mutual and harmonious arrange-
ments between railroads, and that for many years it
had been the practice with all well-conducted rail-
road companies to enter into such mutual arrange-
ments, for the purpose of facilitating their own
operations and accommodating the trade and com-
merce of the country; that without such mutual
arrangements it would have been wholly impossible
to move with efficiency the enormous traffic to

220 which the business of the country had given rise, and that the necessity for such arrangements had been universally acknowledged by all managers of railroad companies, by all shippers and other persons engaged in trade requiring the transportation of merchandise, by State legislatures in requiring railroad companies to make connections with each other and to allow the passage over one road of trains and cars belonging to another, and by the Congress of the United States in the passage of the act commonly known as the Interstate Commerce Act, and that the result of the system which had thus gradually grown up and been established has been such thorough and efficient means of trans-
221 portation by rail that the smallest article of traffic may be transported between points the most remote, on schedules and upon terms and at a cost known accurately in advance by the shipper.

XIV.—This defendant further avers that each of the defendant companies, parties to said agreement, is subject to the provisions of the Act to regulate commerce enacted by Congress for the regulation of the business of interstate transportation by rail; that the leading requirements of the said Act are, that all charges shall be reasonable and just; that all unjust discrimination shall be prohibited, and that no undue or unreasonable
222 preference or advantages shall be given; that in connection with the aforesaid provisions, and in aid of the enforcement thereof, all common carriers subject to said Act are thereby required to establish and print schedules showing the rates, fares and charges in force at any time for the transportation of persons and property, together with the classification of freight, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such rates, fares and charges; that the carriers are required to file these schedules with the Interstate Commerce Commission and to post copies thereof in their stations;

that the carriers are prohibited from changing such 223
schedules, except after ten days' like filing and posting in case of advances, and after three days' like filing and posting in case of reductions, and are also prohibited, under heavy penalties, from charging, demanding, collecting or receiving from any person or persons a greater or less compensation for the transportation of persons or property than is specified by the schedule in force at the time, to the end that no unjust discrimination, in the form of special rates, rebates, drawbacks or otherwise, shall be effected in favor of any shipper; that like provisions are also made in respect to joint traffic which passes over the line of more than one railroad in the course of its transportation, and 224
said Act also requires that reasonable, proper and equal facilities shall be afforded for the interchange of such joint traffic. That the defendant companies, by said Act, are also required to so establish said rates, rules, regulations and classifications of freight that no person, company, firm, corporation, locality or description of traffic shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; that said requirements involve not only the determination in advance of what is a just and reasonable rate upon every article of traffic from every point to every other point over the lines of each individual carrier, and over all joint lines, but also the establish- 225
ment of a vast number of rules and regulations affecting the transportation of freight, which are necessary to prevent discrimination and favoritism among shippers, together with the classification which shall be employed in freight traffic, all of which must be done in such manner that no person, locality or description of traffic shall be subjected to prejudice or disadvantage in any respect whatsoever.

And this defendant avers that concerted action between the carriers is indispensable in order to comply with the aforesaid and other provisions of

226 the interstate commerce law; that the fixing of joint rates, and of a classification of freight for general use, is obviously a matter requiring mutual agreement, and the establishment of every joint rate also involves the fixing of divisions thereof; that for the establishment of tariffs to and from common points a preliminary agreement between the lines in interest is equally necessary, for the reason that unless tariffs for traffic common to two or more lines are equivalent, the business will all flow to the lines naming the lower rates, and other lines will be compelled at once to make reductions in their tariffs, a process which, if pursued, will speedily reduce the rates below a just and reason-
227 able compensation, and will lead to bankruptcies, involving either the extinction of routes or their absorption by competing routes; that the prohibition of preferences and advantages between localities, and in respect to particular descriptions of traffic, necessarily involves a preliminary establishment of the relations proper to be maintained; that such preferences and advantages are equally disastrous and illegitimate when they exist between the tariffs of two or three different carriers as when they appear upon the tariffs of a single carrier; that the Interstate Commerce Act absolutely requires that rates shall be fairly adjusted between localities, and between points of
228 production and consumption of all articles, many of which points are far removed from each other, and are situated upon different railroad lines; and that in the last-mentioned matter, which comprises a great part of the work of the Joint Traffic Association, the several carriers necessarily reflect the interest of shippers upon their respective lines, each official seeking to stimulate and increase the traffic of his own road.

XV.—And this defendant, further answering, avers that it has been a matter of official report by the Interstate Commerce Commission, and this de-

fendant is informed, and believes and avers, that for 229
several years prior to the 19th day of November, 1895, such part of commerce between the States and between the States and foreign countries as consisted of railroad transportation was in a demoralized condition, due in a very large measure to illegitimate competition; that such competition resulted on many lines in the cutting of rates, the giving of rebates and other secret advantages to shippers and numerous unfair practices in order to secure business; that traffic was by such lines often accepted at unremunerative prices in order to keep the railroads employed; that the object sought to be attained by the competing parties was not the benefit of the public or the earning of revenue so as to give 230
to the investor a reasonable and just rate of interest upon his investment, but to swell the volume of tonnage and the number of passengers carried upon individual roads without substantial increase of the volume of traffic upon the roads collectively, and without regard to the cost or the income produced; that such conditions resulted on some lines in great and useless damage to the way, bridges and superstructure of the railroads and great wear and tear to the rolling stock and other equipment consequent upon the carriage of an excessive volume of traffic at unremunerative rates, and the inability and failure to properly maintain the road and appurtenances and rolling stock and equipment; that 231
in consequence of this desire on the part of such railroad companies to obtain business large numbers of persons were employed as soliciting and contracting agents and in through co-operative and commission freight lines, the services of many of whom could with due regard to economy be dispensed with and most of whom in many cases would not have been employed, except as means of self-defense against the action of other companies suspected of illegitimate practices—all the above improper practices tending to, and sometimes resulting in, non-payment of divi-

232 dends, default of interest upon the bonds of railway companies, decrease of earnings, and deterioration and partial destruction of railway properties, impairment of the efficiency and safety of the public service, and great injury to the people of the United States.

And this defendant denies that the true interests of the general public in the operation of the railroads consists in obtaining rates and fares that are unreasonably low or unremunerative to the companies; and it insists, on the contrary, that the duty of the companies cannot be performed with due regard to the public interests upon any such terms, nor as this defendant is advised and believes, can
233 it long be so transacted at all.

And this defendant further avers that a demoralized condition of the business of railroad transportation, such as above described, must always result in rate wars and sudden and violent fluctuations in rates; and that great injury has been caused to the public as a result of the failure or inability of the companies engaged in interstate commerce to maintain reasonable and proper rates, fixed by general acquiescence in the fact of their reasonableness and propriety; that uniformity and stability in the rates of transportation are advantageous to the public, while the cutting of rates below what is reasonable and proper must always result in crip-
234 pling the companies engaged in transportation, in depriving them of the ability to transport reasonably and properly, and in such uncertainty on the part of shippers as must interfere with the safe and proper transaction of their business.

XVI.—And this defendant further answering says that the maintenance of soliciting or contracting passenger and freight agencies such as above mentioned and intended to be abolished by the said agreement, involved an annual expenditure approximating four millions of dollars, and that the suppression or abandonment of many of such agencies

will secure economy of administration and an advantageous result both to the companies and the shippers; that because of the remoteness of these agencies from the general offices of the companies, and the fact of their individual contact with shippers when dealing directly with them in reference to rates, it has become difficult to confine them in every instance to an observance of the provisions of the Act to regulate Commerce and other laws and regulations or to the instructions of the officers of the companies; and it was believed that the discontinuance of them in a large part and making the remainder subordinate to the Managers of the Traffic Association would, and this defendant avers that the same does, tend to an enforcement of the provisions of the said Act to regulate Commerce, and in no wise violates the provisions of that or any other law. 235 236

This defendant says that the purpose of the parties to the said agreement in inserting the provisions therein contained relating to freight lines and agencies was to prevent, so far as possible, the payment of commissions and the use of other subterfuges, secret practices and methods resulting in the past in unjust discriminations between shippers and in great detriment to the public.

XVII.—And this defendant further answering says that in the course of the growth of the various railroad systems hereinbefore mentioned, and as a result thereof, it had become apparent that certain of the competitive lines had indisputable advantages over others, either by reason of being shorter or superior in point of grade, or other particulars, and that the necessary tendency of such condition is that the superior lines should at equal rates attract the main body of the traffic; but that in railroad competition, unlike that prevailing in other branches of business, a company which may be unable to do business at a given rate must lower its rates, even though thereby it may be compelled to do its busi- 237

238 ness for less than the cost thereof, and that the result of such competition is to insure, if long continued, the bankruptcy and ruin of the weaker road, and either its destruction as a means of transportation or its absorption by its more powerful rivals, and the consequent extinguishment of competition to that extent.

And this defendant further says that the continuance of all the routes embraced by the systems mentioned in said bill of complaint is a great public advantage, inasmuch as there are periods in every year in which the pressure of traffic is so great as to bring into requisition all the facilities of all the lines, and that great and incalculable public injury would result from the extinction of any such facilities, and that such injury would be fatal not only
239 to those interests which embrace through traffic, but also all the local interests along the lines of such weaker routes.

And this defendant says that it has for many years past been found necessary in order to sustain such weaker routes and enable them to continue in operation and to perform their useful functions, that the disadvantages under which they labor should, in some measure, be recognized by voluntary concessions made by stronger roads for the purpose of securing to them a fair share of such through traffic as might not have been destined by the shippers
240 thereof for some particular route, and that the effect of such concessions has been salutary and for the interest not only of such weaker roads, but of the public at large.

XVIII.—And this defendant further answering says that the necessary demands of the trade and commerce of the country in connection with its system of railway transportation, hereinbefore mentioned, which can be satisfied only by concert of action between the various independent lines, and which have, in a certain measure, heretofore been accomplished by conference and agreement, have

not been fully and satisfactorily accomplished; and 241
that the object and purpose of the said agreement and of the various railroad companies, defendants herein, in entering into the same were to more fully and completely satisfy the requirements of the trade and commerce of the country in respect to railway transportation, and to check and remove, so far as possible, the disadvantages and mischiefs which would inevitably arise from the want of necessary concert of action and from illegitimate and ruinous competition.

That to this end the parties to said agreement reaffirmed the rates, fares, and charges and the rules applicable thereto which were in force and were authorized by the said companies, in respect to the 242
traffic covered by said agreement, at and prior to the making thereof. That said rates, fares, charges and rules were, and had been established by each corporation because they were reasonable, just and necessary, and schedules thereof had been duly filed with the Interstate Commerce Commission; and by said agreement the said companies provided a method by which the same could from time to to time be modified with due regard to the interests of all concerned; that power was, therefore, by the said agreement given to the Managers therein mentioned to recommend such changes in the said rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic covered 243
by the agreement and for protecting the interests of the parties to the said agreement therein, and that it was in and by the said agreement provided that any one of the companies, parties to said agreement, might, pursuant to the terms thereof by the action of its Board of Directors, disapprove of such recommendation, and that such disapproval should become effective thirty days after the receipt of such resolution of disapproval by the Board of Managers, and the powers of the said Board of Managers were in and by the said agreement expressly made subject to the provisions of the laws of the

United States; and the said agreement expressly provided that the powers conferred upon the Managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties thereto, and that the Board of Managers should co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established thereunder.

And this defendant further says that the powers granted in and by the said agreement to the Board of Managers in respect to recommending changes in rates, fares, charges and rules, and the provisions of the said agreement relating to action to be taken upon such recommendation, were intended to promote the establishment of rates, fares, charges and rules which should be reasonable and just both to the transportation companies and shippers and passengers using the lines embraced within the scope of the said agreement, and this defendant believes and avers that such powers and provisions will promote the accomplishment of such purpose and intention by affording opportunity for the due consideration of the reasonableness of any proposed rate, fare, charge or rule by all the lines interested and an interchange of views on the effect of the change recommended by the Board of Managers and at the same time, by checking strife and preventing illegitimate competition and sudden and selfish action, avert financial ruin to one or more of the competing companies and yet preserve to the public adequate facilities at fixed and reasonable prices and under stable and reasonable regulations.

And this defendant avers that a further practical effect of the provisions of said agreement relating to the power of said managers to recommend changes in said rates, fares, charges and rules is that in case, as is usual, any proposition

concerning the same shall involve discrimination 247
or prejudice to other points or on other lines, unless corresponding changes are elsewhere made, an opportunity is afforded, under the said agreement, for the reduction of rates, and for changes in rules and regulations, in such a way and manner as will maintain the due relations of rates, each with all others, and will prevent undue preference and advantage between individuals and between cities and towns, by making the reductions and changes, subject to the action of the respective boards of directors, effective over all lines at the same time.

And this defendant further avers that one of the practically injurious results to localities, of the conditions existing before and at the time of entering into the said agreement, arose from the fact 248
that frequently two communities, or different parts of the same community, in a large sense interdependent, were each only accessible by a single line of railroad different from, and independent of, that serving the other; that unequal rates resulted, and great prejudice was caused to the locality served only by the independent line charging the higher rate or furnishing inferior facilities; that uniformity of rates and equality of facilities as between such independent lines were only attainable by such harmony of action as results from the existence of an association of the character established by the said agreement, and that the tendency and effect of said agreement is to carry out 249
and effectuate the purposes, in this regard, of the Act to regulate commerce.

And this defendant, further answering, avers that since the execution of the said agreement all the schedules aforesaid of rates, fares and charges and the rules applicable thereto, have been filed with the Managers of said Joint Traffic Association as provided in said agreement, and that the said rates, fares and charges and the rules applicable thereto are in all respects just and reasonable, have in no respects been disapproved by the said Interstate

250 Commerce Commission, and have been in all respects maintained and kept in force and effect, except that in some instances reductions of rates, fares and charges have been recommended by the said Managers of the Joint Traffic Association, and have been observed by the defendant corporations interested therein; but such reductions have been made not because the former rates were unreasonable or excessive, but for the purpose of avoiding or correcting discriminations, and securing uniformity of rates, or accommodating the changing necessities of business.

XIX.—And this defendant, further answering,
251 avers that the purpose and intention of the several railroad companies, parties to the said agreement, is honestly and fairly set forth in the body of said agreement, wherein it is provided, among other things, that the powers conferred upon the Managers of the said Joint Traffic Association shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or of any other law applicable to the premises, or any of the provisions of the charters or the laws of the companies, parties thereto, and that the Managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares and charges established under the said arti-
252 cles, and also in the preamble thereof wherein it is declared that the purposes of the said agreement are to aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and Interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service. And further avers that it is the purpose and intention of the said Joint Traffic Association and its Board of

Control and of its Board of Managers and its several officers and of the several railroad companies, parties to the said agreement, fully, fairly and honestly to carry out the purposes stated in the said agreement, and that the said association, its boards and officers, and each and all of the said railroad companies, parties to the said agreement, have no other or different purpose or intention than in the said agreement and in this answer are set forth. 253

And this defendant denies the existence of any purpose, contract, agreement, contrivance, combination or conspiracy, in connection with the formation of the said Joint Traffic Association, or otherwise, to unjustly or oppressively increase or augment the rates or fares charged for the transportation of interstate traffic, or to counteract the effect of free competition on the facilities or prices of transportation or to establish or maintain arbitrary or unreasonable rates or to prevent any one of the railroad companies, parties to the said agreement, from reducing rates, and it denies that by the formation of the said Joint Traffic Association the rates or prices for transporting traffic on any of the lines of the companies parties to the said agreement have been, or will be, unjustly, unreasonably or oppressively, increased or augmented; and it further denies the existence in connection with the formation of the said Joint Traffic Association, or otherwise, of any intention to monopolize trade, traffic or commerce among or between the States, Territories or foreign countries in the bill of complaint mentioned and referred to, or that by reason of the formation of the said Joint Traffic Association or otherwise, such trade, traffic or commerce has been in fact or can or will be monopolized. 254 255

And this defendant says that while there is no requirement of law which establishes or requires free competition in the business of transportation, it was and is the intention of each of the companies parties to the said agreement to obtain for

256 itself all of said trade, traffic and commerce possible as against all other of such companies and all outside lines.

XX.—This defendant further says that while the lines enumerated in the said agreement and in the bill of complaint as being within the purview of the said agreement are lines of transportation and communication used for interstate commerce, they are not the only lines used or capable of being used within the same transportation territory for such traffic, but that there are several other lines which can be and are used for such traffic, and over which a large amount of such traffic has been transported
257 since the said agreement went into effect.

This defendant, further answering, says that the same separate, distinctive and competitive lines of transportation and communication extending among and between the States of the United States continue to exist as before the making of the said agreement of the 19th of November, 1895.

XXI.—And this defendant further avers that the several railroad companies, parties to the said agreement, intend to continue to be engaged independently in transportation among the States and Territories of the United States and with foreign nations, and to continue in active competition with
258 each other for traffic both in freight and passengers, and to furnish to all persons engaged in such traffic or travel among the several States and Territories of the United States separate and independent and competitive lines of transportation in respect to the traffic mentioned in the bill of complaint, and further intend that all charges made for any service rendered or to be rendered in the transportation of passengers or property among the States and Territories of the United States and with foreign countries, or in connection therewith, shall be reasonable and just, and that no unjust or unreasonable or unlawful charge for such service

shall be exacted ; and that it is not the purpose or 259
intention of any of the railroad companies, parties to the said agreement, directly or indirectly, either by themselves or through any board or officer of the Joint Traffic Association, or otherwise, by any special rate, rebate, drawback, or other device, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of the Interstate Commerce Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially 260
similar circumstances and conditions ; and that no undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, shall be made or given, or any particular description of traffic be subjected to any undue or unreasonable preference or disadvantage in any respect whatsoever, and that each and every carrier, party to the said agreement, shall and will, according to their and each of their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from 261
their several lines and those connecting therewith, and shall not discriminate in their rates or charges between such connecting lines, and that it is the intention of the railroad companies, parties to the said agreement, and each of them, not to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, except by authority of the Interstate Commerce Commission, and that it is not the pur-

262 pose or intention of any or either of the railroad companies, parties to the said agreement, to pool freights of different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion of them.

XXII.—And this defendant further says that the said agreement of the 19th of November, 1895, was duly filed with the Interstate Commerce Commission, as required by law.

And this defendant further answers that there is nothing in the said agreement contained, nor was it intended that there should be anything in its opera-
263 tion or effect, which will in any manner interfere with or tend to prevent the full performance by the companies parties thereto, respectively of all duties, imposed upon them or any of them by law, or the rendering of any service to the public which is or may be lawfully required of them or any or either of them in regard to the traffic covered by the said agreement.

XXIII.—And touching the allegations contained in the amendment to the bill of complaint, filed in this cause on the 9th day of March, 1896, this defendant says that it is informed and believes that on or about the 26th day of December, 1896, Wil-
264 liam R. Morrison, the Chairman of the Interstate Commerce Commission, addressed and delivered to the Attorney-General of the United States a certain communication of which the following is a copy:

"INTERSTATE COMMERCE COMMISSION,
WASHINGTON, December 26, 1895.

Hon. JUDSON HARMON,
Attorney-General.

Dear Sir:

We have the honor to enclose herewith a copy of a contract, agreement, or arrangement entitled "Articles of Organization of the Joint Traffic

Association," entered into between certain common 265
carriers, corporations, named therein, forming said Joint Traffic Association, which is to take effect January 1st, 1896, and was filed with the Commission December 24, 1895. This contract, agreement, or arrangement is, we believe, in conflict with the Act to regulate commerce and cannot be carried into effect without violating the provisions of said Act.

Complying with the requirements of Section 12 of said Act, we have the honor to request that you will direct the U. S. District Attorney for the Southern District of New York or other proper jurisdiction to institute in the proper Court and prosecute under your direction all necessary proceedings, by 266
injunction or otherwise, to prevent the carrying into effect of said contract, agreement or arrangement as contemplated and provided for by said Articles of Organization, and for the punishment of all violations of said Act as the result of the formation of said Joint Traffic Association.

Respectfully,

WM. R. MORRISON,
Chairman.

But whether the said communication was so addressed and delivered by the authority of the Interstate Commerce Commission, this defendant 267
does not know, and has not been informed, save by the allegations of the said amendment to said bill.

And this defendant further answering, says that the railroad companies, parties to the said agreement, are common carriers, engaged in transporting persons and property among the several States and Territories of the United States, and as such common carriers are subject to the provisions of the Act of Congress, approved February 4, 1887, entited "An Act to regulate Commerce," with the various amendments and supplements thereto, and

268 that the said act and amendments and supplements thereto constitute a full, adequate and comprehensive system of regulation and the sole system of regulation which has been established by Congress for railroad companies as common carriers subject to said Act; and this defendant is informed and believes, and avers that no request has been made by the said Interstate Commerce Commission, created by said Act of Congress, to the District Attorney of the United States for the Southern District of New York, to institute or prosecute under the direction of the Attorney-General of the United States, this or any proceedings against this defendant, under the said Act of
269 Congress, approved February 4, 1887, entitled "An Act to regulate Commerce," and the several acts amendatory thereof and supplementary thereto, unless the said letter, a copy whereof is hereinabove set forth, be such a request, which this defendant is advised it is not, and this defendant will claim and insist upon the same benefit and advantage of such objection and omission as fully and completely as if this defendant had demurred to the said bill of complaint.

XXIV.—And this defendant further answering says that the railroad companies, parties to the said agreement, are not nor is either of them, nor is the
270 Joint Traffic Association, nor are its Boards or officers, or any or either of them, subject to the provisions of the Act of Congress entitled, "An Act to protect Trade and Commerce as against unlawful Restraints and Monopolies," approved July 2, 1890, and that the last mentioned act was not an amendment or modification of The Act to regulate Commerce, approved February 4, 1887, and does not relate to the business of common carriers, but has application solely to so-called trusts, industrial combinations and attempted monopolies, undertaken by persons or corporations engaged in trade, as manufacturers, miners, dealers in pro-

ducts, either in raw or manufactured state or otherwise, who carry on the actual transactions which constitute trade or commerce as distinguished from railway corporations, which are engaged in the business of transportation, and that the said agreement of November 19, 1895, does not relate to or affect any trade or commerce within the purview of the said Act, and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to the said bill of complaint. 271

XXV.—This defendant is advised and believes and insists that the complainant cannot in one and the same suit claim the relief prayed in said bill of complaint upon the ground that the said agreement is in violation of the said "Act to regulate Commerce," and may be restrained on the request of the Interstate Commerce Commission, and also upon the ground that the said agreement is in violation of the "Act to protect Trade and Commerce as against unlawful Restraints and Monopolies," and may be restrained on the demand of the Attorney-General, and also upon the general allegation that the said agreement is contrary to law and in violation of the rights of the citizens of the United States, and may be restrained without request or demand of any specified officer of the United States; that said alleged grounds of relief are distinct and separate, and cannot be united in the same suit; and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to the said bill of complaint. 272 273

XXVI.—And this defendant further answering says that it is advised and believes and insists that the complainant is not entitled to have or maintain its said suit or to any relief therein upon mere general allegations, such as contained in said bill, that the said agreement is unlawful, or without spe-

274 cifically alleging that it is in violation of some statute of the United States, and specifying the particular statute, and the particulars in which the said agreement is claimed to be in violation thereof; and this defendant will claim and insist upon the same benefit and advantage of this objection as fully and completely as if this defendant had demurred to the said bill of complaint.

XXVII.—And this defendant further answering says that it is advised and believes and insists that the complainant is not entitled to have or maintain its said suit, or to any relief therein, upon any allegation that the said agreement is in violation of
275 the rights of the citizens of the United States; and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to said bill of complaint.

And this defendant denies all and all manner of unlawful combination and conspiracy and confederacy wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing in the said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to the knowledge or belief of this
276 defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and prays to be dismissed hence.

THE JOINT TRAFFIC ASSOCIATION,

By G. R. BLANCHARD,
Commissioner.

CARTER & LEDYARD,
Solicitors of the above-named Defendant.

JAMES C. CARTER,
LEWIS CASS LEDYARD, } Of Counsel.

STATE OF NEW YORK, } ss. 277
County of New York, }

GEORGE R. BLANCHARD, being duly sworn, on his oath, saith that he is the Commissioner of The Joint Traffic Association, the above-named defendant; that he has read the foregoing answer and knows its contents; that the same is true to the best of his knowledge, information and belief.

G. R. BLANCHARD.

Sworn to before me this 23rd }
day of March, 1896. }

[SEAL.] WALTER T. TAYLOR,
Notary Public,
New York County. 278

(Endorsed):—Circuit Court of the United States for the Southern District of New York. In Equity. The United States of America, Complainant, vs. The Joint Traffic Association, et al., Defendants.—Answer of Defendant, The Joint Traffic Association.—Carter & Ledyard, Solicitors for above-named Defendant.—U. S. Circuit Court, Filed Mar. 23, 1896.—John A. Shields, Clerk.

279

280 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, et al.

281

It is hereby stipulated that the answer of The Joint Traffic Association, one of the defendants in the above-entitled cause, be amended as follows:

1. By striking out the first paragraph of Article XXIII. of the answer, and substituting in lieu thereof the following:

"And touching the allegations contained in the amendment to the bill of complaint, filed in this cause on the 9th day of March, 1896, this defendant says that it is informed and believes that on the 26th day of December, 1895, the Interstate Commerce Commission made and entered on its records
282 an order in substantially the following words:

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 26th day of December, A. D. 1895.

The Commission having under consideration the Articles of Organization of the Joint Traffic Association, it was

Ordered, that the following communication, enclosing copy of said Articles of Organization, be sent to the Attorney-General of the United States":

2. By striking out at the end of the communication above referred to, the words: 283

"But whether the said communication was so addressed and delivered by the authority of the Interstate Commerce Commission, this defendant does not know, and has not been informed, save by the allegations of the said amendment to said bill."

And inserting in lieu thereof the following:

"And this defendant is informed and believes that the chairman of said Interstate Commerce Commission did accordingly, on the same day, send to the Attorney-General of the United States the letter last above set forth, and that the Attorney-General received the same. 284

"And this defendant is informed and believes that thereafter, and prior to the commencement of this suit, the said Attorney-General did direct the United States Attorney for the Southern District of New York to institute all necessary proceedings to prevent the parties to said agreement from carrying the same into effect, and to have the agreement declared null and void, both on the alleged ground that said agreement appeared to be in violation of the provisions of said Act to Regulate Commerce, as amended, and also in violation of the Act of July 2, 1890, entitled; 'An Act to protect Trade and Commerce against unlawful Restraints and Monopolies,' and on all other grounds, if any, by 285 reason of which the said agreement was contrary to law or in violation of the rights of the citizens of the United States.

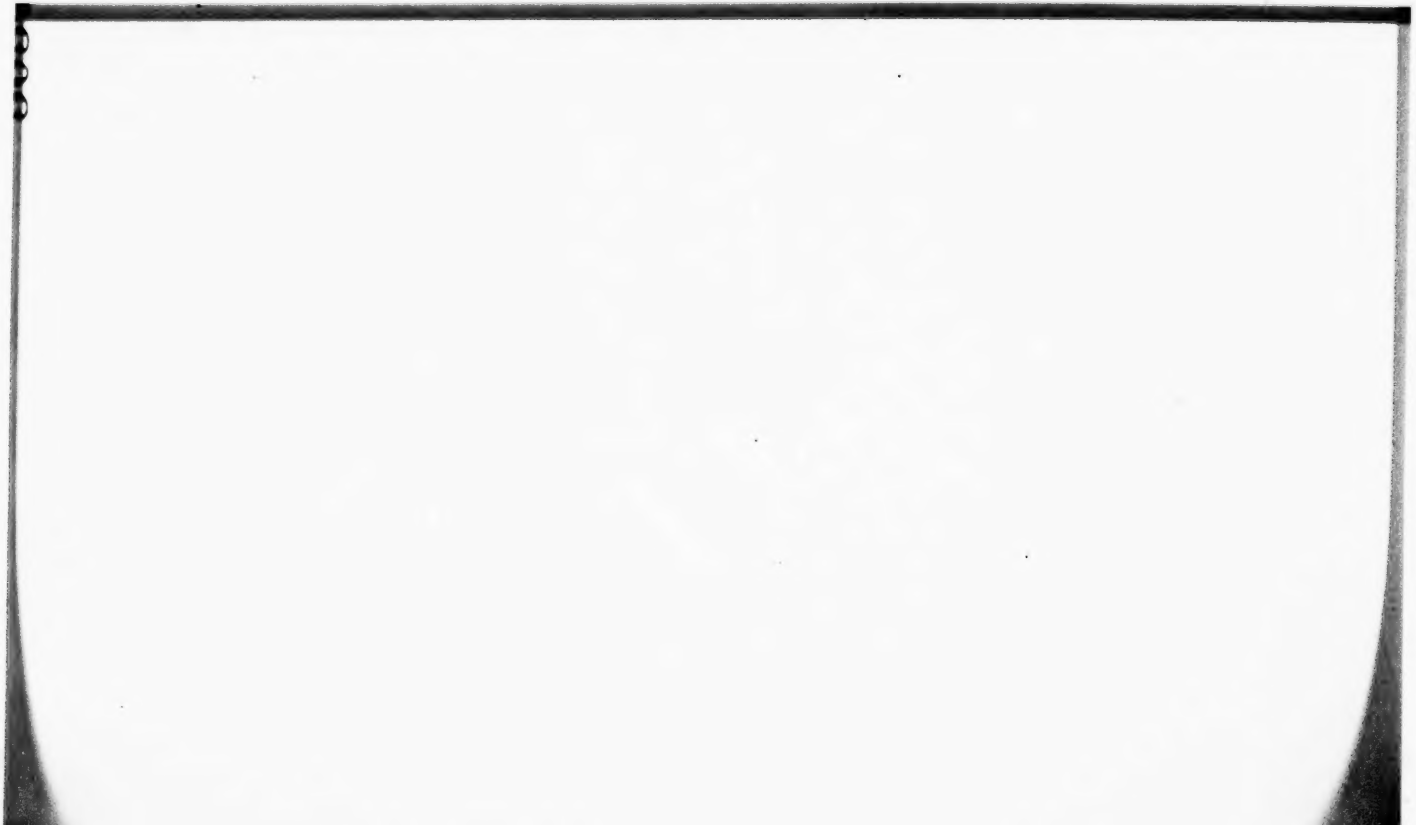
But this defendant denies that the said Interstate Commerce Commission ever took any other action in the premises, or ever gave the defendants herein, or any of them, any notice of any such supposed investigation or order or report, or any opportunity to be heard in respect to the matter, or any part thereof, stated in the bill of complaint in this cause.

286 And this defendant denies that said Interstate Commerce Commission ever made any order or report, as required by law, requiring the defendants herein, or any of them, to desist from putting the said agreement in operation, or from doing any or either of the things provided for in said agreement.

And it further denies that either the proceedings had and taken by said Interstate Commerce Commission, as herein admitted, or any direction given pursuant thereto, were or are legally sufficient to warrant the institution, maintenance or prosecution of this suit."

287

288



292 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY, THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY
293 COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY;
294 THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY.

Defendants.

ANSWER OF DEFENDANT.

The New York Central & Hudson River Railroad Company.

The answer of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, one of the defendants in the above-entitled suit to the bill of complaint of the United States of America, complainant therein.

This defendant, now and at all times hereafter 295
saving and reserving to itself all and all manner of benefit, exception or advantages which can or may be had or taken to the many errors, uncertainties, insufficiencies or other imperfections, in the said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is or are necessary or material for it to make answer to, answering says:

I. That it admits:

That the several railroad companies, defendants herein, are incorporated as in said bill of complaint alleged.

That The Joint Traffic Association is a voluntary 296
association organized under certain "Articles of Organization," entered into and executed by the said several railroad and railway companies, on or about the nineteenth day of November, 1895, a copy of which is annexed to the said bill of complaint as Exhibit A, and that the principal place of business of said Joint Traffic Association is in the City of New York, in the Southern District of New York; but this defendant avers that the said Joint Traffic Association is not incorporated, is not a common carrier and is not engaged in the transportation of freight or passengers.

297
II.—This defendant further admits that all of said corporations defendant are common carriers and as such, at all the days and times mentioned in the bill of complaint and prior thereto, were and now are engaged in the transportation of freight and passengers, either separately or in connection with each other, continuously carried on among the several States of the United States, and among and between the several States of the United States and the Territories thereof, and between such States and Territories and foreign countries, and from places in the United States through foreign countries to other places in the United States.

298 But this defendant denies that any or either of said corporations have ever been otherwise engaged in interstate commerce, or that they, or any or either of them, have ever been engaged in any trade in or in relation to any article or commodity in anywise embraced within the operation or scope of said agreement.

III.—This defendant further admits that prior to the 19th day of November, 1895, the several railroad companies constituting what are termed in said agreement respectively the Baltimore and Ohio, the Chesapeake and Ohio, the Erie, the Grand Trunk, the Lackawanna, the Lehigh Valley, the
299 Pennsylvania, the Vanderbilt and the Wabash systems, with their leased, controlled, or operated lines, owned, operated and controlled separate railroad lines or systems, engaged with their connections independently in commerce among the States and Territories of the United States and with foreign nations and were in active competition with each other for such traffic, both in freight and passengers, and furnished to all persons engaged in such traffic or travel among the States and Territories of the United States separate and independent and competing lines of transportation in respect to the traffic in said bill mentioned; and this defendant avers that ever since the said 19th day of
300 November, 1895, the said railroad companies have continued to own, operate and control the same separate railroad lines or systems, engaged with their connections independently in said commerce, and that they have ever since continued to be and still are in active competition with each other for such traffic, and have ever since furnished and still continue to furnish to all persons engaged in such traffic or travel the same separate and independent and competing lines of transportation in respect to the traffic in said bill mentioned.

IV.—This defendant further admits and answers 301
that on or about the 19th day of November, 1895, the said railroad companies entered, as they were and are advised and believe they had a lawful right to do, into the certain contract, in the form of a written document, entitled "Articles of Organization of the Joint Traffic Association" hereinbefore mentioned.

But this defendant denies that the said contract is an unlawful contract in any of its provisions, or that it is or was intended to be a contract, agreement, combination or conspiracy to restrain trade or commerce among the several States, or was or is an attempt to monopolize, or does or will operate to monopolize, such trade or commerce, or is or was 302
intended to restrain or prevent legitimate competition among such railroads in respect to any inter-state trade or commerce, or does in any way restrain or prevent legitimate competition among said railroads in respect to any of such trade or commerce, or that the said companies or any or either of them in entering into said contract or at any time contrived or intended, or now intend to deprive the public, or have deprived the public engaged in any inter-state trade or transportation of any facilities or advantages which the said public theretofore had lawfully enjoyed from any independent competition of said railroads, or any or either of them, in respect to the traffic described in the bill of 303
complaint, or that the said companies, or any or either of them, at any time intended or now intend to establish or maintain rates of freight or passenger transportation fixed arbitrarily or uninfluenced by competition in respect to any traffic whatever; or that the effect of the said agreement is to establish or maintain rates of freight or passenger transportation fixed arbitrarily, or uninfluenced by competition in respect to any traffic whatever.

V.—This defendant admits that the said agreement establishes a Board of Managers consisting

304 of representatives of a number of the railroad companies or systems parties thereto, and that the agreement confers upon said Board of Managers the powers set forth in the said agreement, Exhibit A, annexed to the bill of complaint, for the provisions of which agreement this defendant begs leave to refer to the same. And this defendant denies each and every allegation of the bill of complaint imputing to the said agreement, or to the parties thereto any other agreement or intent than such as appears on the face thereof, and denies that the said Board of Managers, or any member thereof, has any power in regard to the subject matter embraced in the said agreement except as is
305 specifically granted to the said Board of Managers and the members thereof by the terms of the said agreement.

And this defendant denies that the said agreement confers upon the Board of Managers any right or authority to establish rates, fares, charges or rules for governing the traffic within the scope of the agreement.

VI.—This defendant further answering, denies that by the said agreement, or otherwise, the said companies, or any or either of them, surrendered to the said association any traffic whatever; or that it was or is the intention of said companies, or any or
306 either of them, or that it is or will be the effect of said agreement, to surrender to said association any traffic whatever.

VII.—This defendant admits that the traffic passing from, to or through the western termini of the trunk lines referred to in the said agreement constitutes a considerable and important part of all the freight and passenger traffic carried on between the several States and Territories of the United States, and between them and adjacent foreign countries, and that prior to the time when the said agreement went into effect the said rail-

road companies and systems, or many of them, were in competition with each other for said traffic; but this defendant denies that such competition as conducted prior to the time when said agreement went into effect, resulted in advantage to the public engaged in such traffic or to the benefit or advantage of the people of the United States. And this defendant denies that said agreement was or is an oppressive or unlawful contract, agreement, combination or conspiracy. 307.

VIII.—This defendant denies that in and by the terms of the said agreement attached to the bill of complaint, "Exhibit A," the said railroad companies, parties thereto, with the purpose of terminating all or any competition among themselves for the freight and passenger traffic aforesaid, or for any purpose, unlawfully or otherwise, agreed to surrender the control of such traffic to the Board of Managers created by the terms of the said agreement, or agreed to terminate existing through co-operative or commission freight lines, although this defendant answers and admits that said companies, without any unlawful purpose, but as they were advised and believed and still are advised and believe they lawfully might do, agreed, for reasons of economy, to limit or terminate some or many of the powers or functions of existing through co-operative and commission freight lines, and, except with the approval of the managers, to abandon all agencies for soliciting or contracting for any of the freight or passenger traffic within the scope of the said agreement, and to vest in the said Board of Managers full authority to organize joint freight and passenger agencies, as they might deem desirable; and that each and every of the said companies, in and by the said agreement, as they were advised and believed and still are advised and believe they lawfully might do, agreed not to maintain, directly or indirectly, in respect to the traffic covered by said agreement, any freight or 308 309

310 passenger agency except with the approval of the said Board of Managers, and to employ nobody in soliciting or contracting for any of such traffic to whom the said Board of Managers should object; but this defendant denies that the said companies, or any or either of them, in and by the said agreement or otherwise, surrendered to the said Board of Managers full or absolute control over all or any of the said competitive interstate traffic or commerce within the scope of said agreement, and this defendant avers that the sole purpose of the parties to the agreement in inserting the provisions therein contained relative to freight lines and agencies was, so far as they lawfully might, to prevent
311 illegitimate and ruinous competition, and the payment of rebates and commissions and the use of other subterfuges and secret practices which would result in unjust discriminations as between shippers and detriment to the public.

IX.—This defendant denies that in and by the said agreement the said companies, or any of them, unlawfully or in restraint of trade or commerce among the several States, or otherwise, agreed that the said Board of Managers should divide the said competitive traffic among the railroad companies, parties to the said agreement, in such proportions as the said Board of Managers should determine,
312 or that full control of any of the aforesaid competitive traffic was surrendered or entrusted by the terms of said agreement to the said Board of Managers; but this defendant admits that by said agreement it was provided that the Managers should be charged with the duty of securing to each of the companies parties thereto equitable proportions of the competitive traffic covered by said agreement so far as might be legally done; and this defendant denies that the said agreement unlawfully or otherwise combined a large or any part of the freight business of the said several competing railroads or railroad systems, or unlaw-

fully restrained or prevented competition among 313
the said railroads, or any or either of them in respect to any competitive traffic, or unlawfully restrained trade or commerce among the several States and Territories of the United States, or unlawfully or otherwise attempted to monopolize any part of such interstate trade or commerce.

X.—This defendant denies that the several railroad companies or systems, parties to the said agreement, or any or either of them, in or by the said agreement or otherwise, agreed that the Board of Managers created by said agreement and thereby charged with the execution thereof, should have power to establish the rates, fares or charges 314
for carrying such interstate traffic, either freight or passenger.

This defendant admits that the said agreement conferred upon said Board of Managers power to determine, when in their judgment necessary, the divisions of rates, fares and charges between connecting companies, parties to said agreement, and so far as practicable, between companies parties to said agreement and other railroad companies connecting with the parties to said agreement or any of them, keeping in view uniformity and the equities involved.

But this defendant answers and avers that the power conferred upon the said Board of Managers 315
to determine the divisions of rates and fares between the several railroad companies was not a power conferred upon the Board of Managers to fix or determine rates for through traffic over connecting lines, but only to fix and determine the *pro rata* share or division of such established through rates or fares to be apportioned to the several railroad companies owning or operating the connecting railroads constituting such through lines.

And this defendant denies that in or by the said agreement the said companies or any or either of

316 them unlawfully, or in restraint of interstate trade or commerce or otherwise contracted, agreed or combined among themselves for the division between them of a portion of the earnings of the said several railroad companies, parties to the said agreement. And further denies that the said companies or systems, parties to said agreement, or any or either of them, had any purpose to restrain interstate trade or commerce by unlawfully or otherwise pooling or combining any part thereof, for which, prior to the date of the said agreement the said railroads or systems, or any or either of them, were actively or independently competing.

And this defendant further denies that the
317 unrestrained and illegitimate competition for interstate trade and commerce by the several railroad companies and systems which prevailed prior to the first day of January, eighteen hundred and ninety-six, and which in the said bill of complaint is erroneously styled active and independent competition, was to the advantage of the public or the United States in facilities, rates, fares or charges or otherwise.

XI.—This defendant denies that in and by said agreement the railroad companies and systems aforesaid, parties thereto, agreed that any failure to abide by the rates, fares and charges to govern the inter-
318 state traffic and commerce aforesaid, as recommended by the Board of Managers aforesaid, should be deemed a violation of said agreement or articles of organization. But this defendant avers that it was provided by the said agreement that the Managers should from time to time recommend such changes in said rates, fares, charges and rules as might be reasonable and just and necessary for the governing of the traffic covered by the said agreement and for protecting the interests therein of the parties to the said agreement, and that the failure to observe such recommendations by any party to the said agreement as and when made should

be deemed a violation of the said agreement, and 319
that the company or companies committing such violation should be subjected to the fines and penalties, in said agreement mentioned.

But this defendant avers that such provision of said agreement is subject to and is qualified and modified by other provisions of said agreement, under and by virtue of which any railroad company may, so far as concerns itself, by action of its Board of Directors, and upon timely and reasonable notice, disapprove, deviate from and change the rates, fares, charges, and rules so recommended, without subjecting such company to any fine or penalty.

And this defendant denies that there was 320
any oppressive or illegal purpose whatever in agreeing to any of the provisions of the said agreement, or that any of the provisions of the said agreement were unjust, oppressive or unlawful, or that there was inserted in the said agreement any provision, the purpose or intention of which was, or which has the effect, to combine the freight and divide the earnings of the said railroad companies, parties thereto, or any portion thereof, or in any respect to restrain or monopolize trade or commerce among the several States and Territories of the United States.

XII.—This defendant answering the allegations 321
of the bill of complaint as to the right of any company to retire from the association created by said agreement, and as to the duration of the said agreement, begs leave to refer to the provisions of said agreement in that behalf; and this defendant admits that it is provided in the said agreement that the Board of Managers, therein created and charged with the duty of executing the same, should have their principal office in the City of New York, in the Southern District of New York, and that the said Board of Managers has been organized under said agreement, and did at

322 the time of the filing of the bill herein consist of the persons in that behalf mentioned in said bill of complaint; and that the said railroad companies have put into full operation all the provisions of their said agreement and, through the Board of Managers and other officers, hold meetings in the City of New York and Southern District of New York, but denies that such acts, or any of them, are done with any unlawful purpose or in any respect operated to any detriment or disadvantage of the public, or are in violation of any of the laws of the United States.

XIII.—And this defendant further answering, touching the matters and things alleged in the said bill of complaint, says: That the railroad systems
323 of the United States, and in particular those parts of the same which are embraced under the operation of the agreement mentioned in the said bill, had grown into the condition in which they were at the time of the making of the said agreement, by a long and gradual process, in obedience, partly to the necessities of trade and commerce, and partly to the supply of capital and the display of enterprise in furnishing railroad facilities for such trade and commerce; that the great lines of railroad in the United States, and in particular the trunk lines constituting the systems mentioned
324 in said bill of complaint, had been made up of roads originally constructed for comparatively short distances, and afterwards, from time to time lengthened by additions, in some cases constructed by the same corporations by which the first roads were owned and in others by different corporations, and that the same had in like manner, from time to time, been enlarged and extended laterally and otherwise by new roads and extensions of roads, until the whole country had been covered by a network of lines which had, from time to time, by purchase, lease, merger, sale under the foreclosure of mortgages, and other methods of con-

solidation, been united under proprietorships very 325
few in number as compared with those constructing and controlling the original parts; that the original and separate roads were built from time to time in response to the most pressing demands, because the enterprise was promising and hopeful in point of expected profit, and that the gradual consolidation through the means above mentioned had been shaped in accordance with the necessities arising from the rapid growth of business, the building up of towns and cities and the concentration of business interests in the same; that originally transportation for considerable distances could only be had by successive dealings with different railroads under different proprietorships and control, and so 326
required, to the great embarrassment of trade, frequent changes of cars, by reason of difference in railroad gauge or refusal to interchange cars on roads of equal gauges; that this embarrassment had become aggravated by the circumstance that the tariffs of rates were different upon different railroads and few, if any, joint tariffs existed by which transportation could be rapid, simple and convenient and the cost thereof certain and known beforehand; that the difficulties and embarrassments thus encumbering the trade and commerce of the country could be overcome only as they had, in fact, been overcome, by the consolidation of ownerships, or, where this was not practicable, by conference, agreement and com- 327
munity of arrangement among the numerous independent roads; that the trade and commerce of the country absolutely required such conferences and the making of mutual and harmonious arrangements between railroads, and that for many years it had been the practice with all well-conducted railroad companies to enter into such mutual arrangements, for the purpose of facilitating their own operations and accommodating the trade and commerce of the country; that without such mutual arrangements it would have been wholly impossible to move with efficiency the enormous traffic to

328 which the business of the country had given rise, and that the necessity for such arrangements had been universally acknowledged by all managers of railroad companies, by all shippers and other persons engaged in trade requiring the transportation of merchandise, by State legislatures in requiring railroad companies to make connections with each other and to allow the passage over one road of trains and cars belonging to another, and by the Congress of the United States in the passage of the act commonly known as the Interstate Commerce Act, and that the result of the system which had thus gradually grown up and been established has been such thorough and efficient means of trans-
329 portation by rail that the smallest article of traffic may be transported between points the most remote, on schedules and upon terms and at a cost known accurately in advance by the shipper.

XIV.—This defendant further avers that each of the defendant companies, parties to said agreement, is subject to the provisions of the Act to regulate commerce enacted by Congress for the regulation of the business of interstate transportation by rail; that the leading requirements of the said Act are, that all charges shall be reasonable and just; that all unjust discrimination shall be prohibited, and that no undue or unreasonable
330 preference or advantages shall be given; that in connection with the aforesaid provisions, and in aid of the enforcement thereof, all common carriers subject to said Act are thereby required to establish and print schedules showing the rates, fares and charges in force at any time for the transportation of persons and property, together with the classification of freight, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such rates, fares and charges; that the carriers are required to file these schedules with the Interstate Commerce Commission and to post copies thereof in their stations;

that the carriers are prohibited from changing such 331
schedules, except after ten days' like filing and posting in case of advances, and after three days' like filing and posting in case of reductions, and are also prohibited, under heavy penalties, from charging, demanding, collecting or receiving from any person or persons a greater or less compensation for the transportation of persons or property than is specified by the schedule in force at the time, to the end that no unjust discrimination, in the form of special rates, rebates, drawbacks or otherwise, shall be effected in favor of any shipper; that like provisions are also made in respect to joint traffic which passes over the line of more than one railroad in the course of its transportation, and 332
said Act also requires that reasonable, proper and equal facilities shall be afforded for the interchange of such joint traffic. That the defendant companies, by said Act, are also required to so establish said rates, rules, regulations and classifications of freight that no person, company, firm, corporation, locality or description of traffic shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; that said requirements involve not only the determination in advance of what is a just and reasonable rate upon every article of traffic from every point to every other point over the lines of each individual carrier, and over all joint lines, but also the establish-
ment of a vast number of rules and regulations 333
affecting the transportation of freight, which are necessary to prevent discrimination and favoritism among shippers, together with the classification which shall be employed in freight traffic, all of which must be done in such manner that no person, locality or description of traffic shall be subjected to prejudice or disadvantage in any respect whatsoever.

And this defendant avers that concerted action between the carriers is indispensable in order to comply with the aforesaid and other provisions of

334 the interstate commerce law; that the fixing of joint rates, and of a classification of freight for general use, is obviously a matter requiring mutual agreement, and the establishment of every joint rate also involves the fixing of divisions thereof; that for the establishment of tariffs to and from common points a preliminary agreement between the lines in interest is equally necessary, for the reason that unless tariffs for traffic common to two or more lines are equivalent, the business will all flow to the lines naming the lower rates, and other lines will be compelled at once to make reductions in their tariffs, a process which, if pursued, will speedily reduce the rates below a just and reason-
335 able compensation, and will lead to bankruptcies, involving either the extinction of routes or their absorption by competing routes; that the prohibition of preferences and advantages between localities, and in respect to particular descriptions of traffic, necessarily involves a preliminary establishment of the relations proper to be maintained; that such preferences and advantages are equally disastrous and illegitimate when they exist between the tariffs of two or three different carriers as when they appear upon the tariffs of a single carrier; that the Interstate Commerce Act absolutely requires that rates shall be fairly adjusted between localities, and between points of
336 production and consumption of all articles, many of which points are far removed from each other, and are situated upon different railroad lines; and that in the last-mentioned matter, which comprises a great part of the work of the Joint Traffic Association, the several carriers necessarily reflect the interest of shippers upon their respective lines, each official seeking to stimulate and increase the traffic of his own road.

XV.—And this defendant, further answering, avers that it has been a matter of official report by the Interstate Commerce Commission, and this de-

fendant is informed, and believes and avers, that for 337
several years prior to the 19th day of November, 1895, such part of commerce between the States and between the States and foreign countries as consisted of railroad transportation was in a demoralized condition, due in a very large measure to illegitimate competition; that such competition resulted on many lines in the cutting of rates, the giving of rebates and other secret advantages to shippers and numerous unfair practices in order to secure business; that traffic was by such lines often accepted at unremunerative prices in order to keep the railroads employed; that the object sought to be attained by the competing parties was not the benefit of the public or the earning of revenue so as to give 338
to the investor a reasonable and just rate of interest upon his investment, but to swell the volume of tonnage and the number of passengers carried upon individual roads without substantial increase of the volume of traffic upon the roads collectively, and without regard to the cost or the income produced; that such conditions resulted on some lines in great and useless damage to the way, bridges and superstructure of the railroads and great wear and tear to the rolling stock and other equipment consequent upon the carriage of an excessive volume of traffic at unremunerative rates, and the inability and failure to properly maintain the road and appurtenances and rolling stock and equipment; that 339
in consequence of this desire on the part of such railroad companies to obtain business large numbers of persons were employed as soliciting and contracting agents and in through co-operative and commission freight lines, the services of many of whom could with due regard to economy be dispensed with and most of whom in many cases would not have been employed, except as means of self-defense against the action of other companies suspected of illegitimate practices—all the above improper practices tending to, and sometimes resulting in, non-payment of divi-

340 dends, default of interest upon the bonds of railway companies, decrease of earnings, and deterioration and partial destruction of railway properties, impairment of the efficiency and safety of the public service, and great injury to the people of the United States.

And this defendant denies that the true interests of the general public in the operation of the railroads consists in obtaining rates and fares that are unreasonably low or unremunerative to the companies; and it insists, on the contrary, that the duty of the companies cannot be performed with due regard to the public interests upon any such terms, nor as this defendant is advised and believes, can
341 it long be so transacted at all.

And this defendant further avers that a demoralized condition of the business of railroad transportation, such as above described, must always result in rate wars and sudden and violent fluctuations in rates; and that great injury has been caused to the public as a result of the failure or inability of the companies engaged in interstate commerce to maintain reasonable and proper rates, fixed by general acquiescence in the fact of their reasonableness and propriety; that uniformity and stability in the rates of transportation are advantageous to the public, while the cutting of rates below what is reasonable and proper must always result in crip-
342 pling the companies engaged in transportation, in depriving them of the ability to transport reasonably and properly, and in such uncertainty on the part of shippers as must interfere with the safe and proper transaction of their business.

XVI.—And this defendant further answering says that the maintenance of soliciting or contracting passenger and freight agencies such as above mentioned and intended to be abolished by the said agreement, involved an annual expenditure approximating four millions of dollars, and that the suppression or abandonment of many of such agencies

will secure economy of administration and an ad- 343
vantageous result both to the companies and the shippers; that because of the remoteness of these agencies from the general offices of the companies, and the fact of their individual contact with shippers when dealing directly with them in reference to rates, it has become difficult to confine them in every instance to an observance of the provisions of the Act to regulate Commerce and other laws and regulations or to the instructions of the officers of the companies; and it was believed that the discontinuance of them in a large part and making the remainder subordinate to the Managers of the Traffic Association would, and this defendant avers that the same does, tend to an enforcement of the pro- 344
visions of the said Act to regulate Commerce, and in no wise violates the provisions of that or any other law.

This defendant says that the purpose of the parties to the said agreement in inserting the provisions therein contained relating to freight lines and agencies was to prevent, so far as possible, the payment of commissions and the use of other subterfuges, secret practices and methods resulting in the past in unjust discriminations between shippers and in great detriment to the public.

XVII.—And this defendant further answering
says that in the course of the growth of the various 345
railroad systems hereinbefore mentioned, and as a result thereof, it had become apparent that certain of the competitive lines had indisputable advantages over others, either by reason of being shorter or superior in point of grade, or other particulars, and that the necessary tendency of such condition is that the superior lines should at equal rates attract the main body of the traffic; but that in railroad competition, unlike that prevailing in other branches of business, a company which may be unable to do business at a given rate must lower its rates, even though thereby it may be compelled to do its busi-

346 ness for less than the cost thereof, and that the result of such competition is to insure, if long continued, the bankruptcy and ruin of the weaker road, and either its destruction as a means of transportation or its absorption by its more powerful rivals, and the consequent extinguishment of competition to that extent.

And this defendant further says that the continuance of all the routes embraced by the systems mentioned in said bill of complaint is a great public advantage, inasmuch as there are periods in every year in which the pressure of traffic is so great as to bring into requisition all the facilities of all the lines, and that great and incalculable public injury
347 would result from the extinction of any such facilities, and that such injury would be fatal not only to those interests which embrace through traffic, but also all the local interests along the lines of such weaker routes.

And this defendant says that it has for many years past been found necessary in order to sustain such weaker routes and enable them to continue in operation and to perform their useful functions, that the disadvantages under which they labor should, in some measure, be recognized by voluntary concessions made by stronger roads for the purpose of securing to them a fair share of such through traffic as might not have been destined by the shippers
348 thereof for some particular route, and that the effect of such concessions has been salutary and for the interest not only of such weaker roads, but of the public at large.

XVIII.—And this defendant further answering says that the necessary demands of the trade and commerce of the country in connection with its system of railway transportation, hereinbefore mentioned, which can be satisfied only by concert of action between the various independent lines, and which have, in a certain measure, heretofore been accomplished by conference and agreement, have

not been fully and satisfactorily accomplished; and 349
that the object and purpose of the said agreement and of the various railroad companies, defendants herein, in entering into the same were to more fully and completely satisfy the requirements of the trade and commerce of the country in respect to railway transportation, and to check and remove, so far as possible, the disadvantages and mischiefs which would inevitably arise from the want of necessary concert of action and from illegitimate and ruinous competition.

That to this end the parties to said agreement reaffirmed the rates, fares, and charges and the rules applicable thereto which were in force and were authorized by the said companies, in respect to the 350
traffic covered by said agreement, at and prior to the making thereof. That said rates, fares, charges and rules were, and had been established by each corporation because they were reasonable, just and necessary, and schedules thereof had been duly filed with the Interstate Commerce Commission; and by said agreement the said companies provided a method by which the same could from time to to time be modified with due regard to the interests of all concerned; that power was, therefore, by the said agreement given to the Managers therein mentioned to recommend such changes in the said rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic covered 351
by the agreement and for protecting the interests of the parties to the said agreement therein, and that it was in and by the said agreement provided that any one of the companies, parties to said agreement, might, pursuant to the terms thereof by the action of its Board of Directors, disapprove of such recommendation, and that such disapproval should become effective thirty days after the receipt of such resolution of disapproval by the Board of Managers, and the powers of the said Board of Managers were in and by the said agreement expressly made subject to the provisions of the laws of the

352 United States; and the said agreement expressly provided that the powers conferred upon the Managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties thereto, and that the Board of Managers should co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established thereunder.

And this defendant further says that the powers granted in and by the said agreement to the Board of Managers in respect to recommending changes
353 in rates, fares, charges and rules, and the provisions of the said agreement relating to action to be taken upon such recommendation, were intended to promote the establishment of rates, fares, charges and rules which should be reasonable and just both to the transportation companies and shippers and passengers using the lines embraced within the scope of the said agreement, and this defendant believes and avers that such powers and provisions will promote the accomplishment of such purpose and intention by affording opportunity for the due consideration of the reasonableness of any proposed rate, fare, charge or rule by all the lines interested and an interchange of views on the effect of the
354 change recommended by the Board of Managers and at the same time, by checking strife and preventing illegitimate competition and sudden and selfish action, avert financial ruin to one or more of the competing companies and yet preserve to the public adequate facilities at fixed and reasonable prices and under stable and reasonable regulations.

And this defendant avers that a further practical effect of the provisions of said agreement relating to the power of said managers to recommend changes in said rates, fares, charges and rules is that in case, as is usual, any proposition

concerning the same shall involve discrimination 355
or prejudice to other points or on other lines, unless corresponding changes are elsewhere made, an opportunity is afforded, under the said agreement, for the reduction of rates, and for changes in rules and regulations, in such a way and manner as will maintain the due relations of rates, each with all others, and will prevent undue preference and advantage between individuals and between cities and towns, by making the reductions and changes, subject to the action of the respective boards of directors, effective over all lines at the same time.

And this defendant further avers that one of the practically injurious results to localities, of the conditions existing before and at the time of enter- 356
ing into the said agreement, arose from the fact that frequently two communities, or different parts of the same community, in a large sense interdependent, were each only accessible by a single line of railroad different from, and independent of, that serving the other; that unequal rates resulted, and great prejudice was caused to the locality served only by the independent line charging the higher rate or furnishing inferior facilities; that uniformity of rates and equality of facilities as between such independent lines were only attainable by such harmony of action as results from the existence of an association of the character established by the said agreement, and that the ten- 357
dency and effect of said agreement is to carry out and effectuate the purposes, in this regard, of the Act to regulate commerce.

And this defendant, further answering, avers that since the execution of the said agreement all the schedules aforesaid of rates, fares and charges and the rules applicable thereto, have been filed with the Managers of said Joint Traffic Association as provided in said agreement, and that the said rates, fares and charges and the rules applicable thereto are in all respects just and reasonable, have in no respects been disapproved by the said Interstate

358 Commerce Commission, and have been in all respects maintained and kept in force and effect, except that in some instances reductions of rates, fares and charges have been recommended by the said Managers of the Joint Traffic Association, and have been observed by the defendant corporations interested therein; but such reductions have been made not because the former rates were unreasonable or excessive, but for the purpose of avoiding or correcting discriminations, and securing uniformity of rates, or accommodating the changing necessities of business.

XIX.—And this defendant, further answering,
359 avers that the purpose and intention of the several railroad companies, parties to the said agreement, is honestly and fairly set forth in the body of said agreement, wherein it is provided, among other things, that the powers conferred upon the Managers of the said Joint Traffic Association shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or of any other law applicable to the premises, or any of the provisions of the charters or the laws of the companies, parties thereto, and that the Managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares and charges established under the said arti-
360 cles, and also in the preamble thereof wherein it is declared that the purposes of the said agreement are to aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and Interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service. And further avers that it is the purpose and intention of the said Joint Traffic Association and its Board of

Control and of its Board of Managers and 361
its several officers and of the several railroad companies, parties to the said agreement, fully, fairly and honestly to carry out the purposes stated in the said agreement, and that the said association, its boards and officers, and each and all of the said railroad companies, parties to the said agreement, have no other or different purpose or intention than in the said agreement and in this answer are set forth.

And this defendant denies the existence of any purpose, contract, agreement, contrivance, combination or conspiracy, in connection with the formation of the said Joint Traffic Association, or otherwise, to unjustly or oppressively increase or 362
augment the rates or fares charged for the transportation of interstate traffic, or to counteract the effect of free competition on the facilities or prices of transportation or to establish or maintain arbitrary or unreasonable rates or to prevent any one of the railroad companies, parties to the said agreement, from reducing rates, and it denies that by the formation of the said Joint Traffic Association the rates or prices for transporting traffic on any of the lines of the companies parties to the said agreement have been, or will be, unjustly, unreasonably or oppressively, increased or augmented; and it further denies the existence in connection with the formation of the said Joint Traffic Association, or 363
otherwise, of any intention to monopolize trade, traffic or commerce among or between the States, Territories or foreign countries in the bill of complaint mentioned and referred to, or that by reason of the formation of the said Joint Traffic Association or otherwise, such trade, traffic or commerce has been in fact or can or will be monopolized.

And this defendant says that while there is no requirement of law which establishes or requires free competition in the business of transportation, it was and is the intention of each of the companies parties to the said agreement to obtain for

364 itself all of said trade, traffic and commerce possible as against all other of such companies and all outside lines.

XX.—This defendant further says that while the lines enumerated in the said agreement and in the bill of complaint as being within the purview of the said agreement are lines of transportation and communication used for interstate commerce, they are not the only lines used or capable of being used within the same transportation territory for such traffic, but that there are several other lines which can be and are used for such traffic, and over which a large amounf of such traffic has been transported
365 since the said agreement went into effect.

This defendant, further answering, says that the same separate, distinctive and competitive lines of transportation and communication extending among and between the States of the United States continue to exist as before the making of the said agreement of the 19th of November, 1895.

XXI.—And this defendant further avers that the several railroad companies, parties to the said agreement, intend to continue to be engaged independently in transportation among the States and Territories of the United States and with foreign nations, and to continue in active competition with
366 each other for traffic both in freight and passengers, and to furnish to all persons engaged in such traffic or travel among the several States and Territories of the United States separate and independent and competitive lines of transportation in respect to the traffic mentioned in the bill of complaint, and further intend that all charges made for any service rendered or to be rendered in the transportation of passengers or property among the States and Territories of the United States and with foreign countries, or in connection therewith, shall be reasonable and just, and that no unjust or unreasonable or unlawful charge for such service

shall be exacted ; and that it is not the purpose or 367
intention of any of the railroad companies, parties to the said agreement, directly or indirectly, either by themselves or through any board or officer of the Joint Traffic Association, or otherwise, by any special rate, rebate, drawback, or other device, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of the Interstate Commerce Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially 368
similar circumstances and conditions ; and that no undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, shall be made or given, or any particular description of traffic be subjected to any undue or unreasonable preference or disadvantage in any respect whatsoever, and that each and every carrier, party to the said agreement, shall and will, according to their and each of their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from 369
their several lines and those connecting therewith, and shall not discriminate in their rates or charges between such connecting lines, and that it is the intention of the railroad companies, parties to the said agreement, and each of them, not to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, except by authority of the Interstate Commerce Commission, and that it is not the pur-

370 pose or intention of any or either of the railroad companies, parties to the said agreement, to pool freights of different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion of them.

XXII.—And this defendant further says that the said agreement of the 19th of November, 1895, was duly filed with the Interstate Commerce Commission, as required by law.

And this defendant further answers that there is nothing in the said agreement contained, nor was it intended that there should be anything in its operation or effect, which will in any manner interfere
371 with or tend to prevent the full performance by the companies parties thereto, respectively of all duties, imposed upon them or any of them by law, or the rendering of any service to the public which is or may be lawfully required of them or any or either of them in regard to the traffic covered by the said agreement.

XXIII.—And touching the allegations contained in the amendment to the bill of complaint, filed in this cause on the 9th day of March, 1896, this defendant says that it is informed and believes that on or about the 26th day of December, 1896, Wil-
372 liam R. Morrison, the Chairman of the Interstate Commerce Commission, addressed and delivered to the Attorney General of the United States a certain communication of which the following is a copy:

"INTERSTATE COMMERCE COMMISSION,
WASHINGTON, December 26, 1895.

Hon. JUDSON HARMON,
Attorney-General.

Dear Sir:

We have the honor to enclose herewith a copy of a contract, agreement, or arrangement entitled "Articles of Organization of the Joint Traffic

Association," entered into between certain common 373
carriers, corporations, named therein, forming said Joint Traffic Association, which is to take effect January 1st, 1896, and was filed with the Commission December 24, 1895. This contract, agreement, or arrangement is, we believe, in conflict with the Act to regulate commerce and cannot be carried into effect without violating the provisions of said Act.

Complying with the requirements of Section 12 of said Act, we have the honor to request that you will direct the U. S. District Attorney for the Southern District of New York or other proper jurisdiction to institute in the proper Court and prosecute under your direction all necessary proceedings, by 374
injunction or otherwise, to prevent the carrying into effect of said contract, agreement or arrangement as contemplated and provided for by said Articles of Organization, and for the punishment of all violations of said Act as the result of the formation of said Joint Traffic Association.

Respectfully,

WM. R. MORRISON,
Chairman.

But whether the said communication was so addressed and delivered by the authority of the Interstate Commerce Commission, this defendant 375
does not know, and has not been informed, save by the allegations of the said amendment to said bill.

And this defendant further answering, says that the railroad companies, parties to the said agreement, are common carriers, engaged in transporting persons and property among the several States and Territories of the United States, and as such common carriers are subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to regulate Commerce," with the various amendments and supplements thereto, and

376 that the said act and amendments and supplements thereto constitute a full, adequate and comprehensive system of regulation and the sole system of regulation which has been established by Congress for railroad companies as common carriers subject to said Act; and this defendant is informed and believes, and avers that no request has been made by the said Interstate Commerce Commission, created by said Act of Congress, to the District Attorney of the United States for the Southern District of New York, to institute or prosecute under the direction of the Attorney-General of the United States, this or any proceedings against this defendant, under the said Act of
377 Congress, approved February 4, 1887, entitled "An Act to regulate Commerce," and the several acts amendatory thereof and supplementary thereto, unless the said letter, a copy whereof is hereinabove set forth, be such a request, which this defendant is advised it is not, and this defendant will claim and insist upon the same benefit and advantage of such objection and omission as fully and completely as if this defendant had demurred to the said bill of complaint.

XXIV.—And this defendant further answering says that the railroad companies, parties to the said agreement, are not nor is either of them, nor is the
378 Joint Traffic Association, nor are its Boards or officers, or any or either of them, subject to the provisions of the Act of Congress entitled, "An Act to protect Trade and Commerce as against unlawful Restraints and Monopolies," approved July 2, 1890, and that the last mentioned act was not an amendment or modification of The Act to regulate Commerce, approved February 4, 1887, and does not relate to the business of common carriers, but has application solely to so-called trusts, industrial combinations and attempted monopolies, undertaken by persons or corporations engaged in trade, as manufacturers, miners, dealers in pro-

ducts, either in raw or manufactured state or otherwise, who carry on the actual transactions which constitute trade or commerce as distinguished from railway corporations, which are engaged in the business of transportation, and that the said agreement of November 19, 1895, does not relate to or affect any trade or commerce within the purview of the said Act, and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to the said bill of complaint. 379

XXV.—This defendant is advised and believes and insists that the complainant cannot in one and the same suit claim the relief prayed in said bill of complaint upon the ground that the said agreement is in violation of the said "Act to regulate Commerce," and may be restrained on the request of the Interstate Commerce Commission, and also upon the ground that the said agreement is in violation of the "Act to protect Trade and Commerce as against unlawful Restraints and Monopolies," and may be restrained on the demand of the Attorney-General, and also upon the general allegation that the said agreement is contrary to law and in violation of the rights of the citizens of the United States, and may be restrained without request or demand of any specified officer of the United States; that said alleged grounds of relief are distinct and separate, and cannot be united in the same suit; and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to the said bill of complaint. 380 381

XXVI.—And this defendant further answering says that it is advised and believes and insists that the complainant is not entitled to have or maintain its said suit or to any relief therein upon mere general allegations, such as contained in said bill, that the said agreement is unlawful, or without spe-

382 cifically alleging that it is in violation of some statute of the United States, and specifying the particular statute, and the particulars in which the said agreement is claimed to be in violation thereof; and this defendant will claim and insist upon the same benefit and advantage of this objection as fully and completely as if this defendant had demurred to the said bill of complaint.

XXVII.—And this defendant further answering says that it is advised and believes and insists that the complainant is not entitled to have or maintain its said suit, or to any relief therein, upon any allegation that the said agreement is in violation of
383 the rights of the citizens of the United States; and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to said bill of complaint.

And this defendant denies all and all manner of unlawful combination and conspiracy and confederacy wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing in the said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to the knowledge or belief of this
384 defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and prays to be dismissed hence.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

[SEAL.] By E. D. WORCESTER,
Secretary.

FRANK LOOMIS,
Solicitor of the above-named Defendant.

E. J. PHELPS,
Of Counsel.

The answer of the defendant, the New York Central & Hudson River Railroad Company, was taken this 23d day of March, in the year eighteen hundred and ninety-six, before me, under the common seal of the said corporation, as by their said seal affixed appears. 385

[SEAL] E. B. HOLBROOK,
Notary Public,
Kings Co.

Certificate filed in New York County.

STATE OF NEW YORK, }
County of New York, } ss.

386

HORACE J. HAYDEN, being duly sworn, on his oath, saith that he is the Second Vice-President of the New York Central & Hudson River Railroad Company, the above-named defendant, and a director of said company: that he has read the foregoing answer and knows its contents; that the same is true to the best of his knowledge, information and belief.

H. J. HAYDEN.

Sworn to before me this 23d day of March, 1896.

[SEAL] E. B. HOLBROOK,
Notary Public,
Kings Co. 387

Certificate filed in New York County.

(Endorsed):—Circuit Court of the United States for the Southern District of New York. In Equity. The United States of America, Complainant, vs. The Joint Traffic Association, et al., Defendants.—Answer of Defendant, The New York Central & Hudson River Railroad Company.—Frank Loomis, Solicitor for above named Defendant, Grand Central Depot, 42nd Street and Fourth Avenue, New York City.—U. S. Circuit Court, Filed Mar. 24, 1896.—John A. Shields, Clerk.

388 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, et al.

389

It is hereby stipulated that the answer of The New York Central & Hudson River R. R. Company, one of the defendants in the above-entitled cause, be amended as follows:

1. By striking out the first paragraph of Article XXIII. of the anwer, and substituting in lieu thereof the following:

"And touching the allegations contained in the amendment to the bill of complaint, filed in this cause on the 9th day of March, 1896, this defendant says that it is informed and believes that on the 26th day of December, 1895, the Interstate
390 Commerce Commission made and entered on its records an order in substantially the following words:

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 26th day of December, A. D. 1895.

The Commission having under consideration the Articles of Organization of the Joint Traffic Association, it was

Ordered, that the following communication, enclosing copy of said Articles of Organization, be

sent to the Attorney-General of the United States": 391

2. By striking out at the end of the communication above referred to the words:

"But whether the said communication was so addressed and delivered by the authority of the Interstate Commerce Commission, this defendant does not know, and has not been informed, save by the allegations of the said amendment to said bill."

And inserting in lieu thereof the following:

"And this defendant is informed and believes that the chairman of said Interstate Commerce Commission did accordingly, on the same day, send to the Attorney General of the United States the letter last above set forth, and that the Attor- 392
ney-General received the same.

And this defendant is informed and believes that thereafter, and prior to the commencement of this suit, the said Attorney-General did direct the United States Attorney for the Southern District of New York to institute all necessary proceedings to prevent the parties to said agreement from carrying the same into effect, and to have the agreement declared null and void, both on the alleged ground that said agreement appeared to be in violation of the provisions of said Act to Regulate Commerce, as amended, and also in violation of the Act of July 2, 1890, entitled: 'An Act to protect Trade and Commerce against unlawful Restraints and 393
Monopolies,' and on all other grounds, if any, by reason of which the said agreement was contrary to law or in violation of the rights of the citizens of the United States.

But this defendant denies that the said Interstate Commerce Commission ever took any other action in the premises, or ever gave the defendants herein, or any of them, any notice of any such supposed investigation or order or report, or any opportunity to be heard in respect to the matter, or any part thereof, stated in the bill of complaint in this cause.

394 And this defendant denies that said Interstate Commerce Commission ever made any order or report, as required by law, requiring the defendants herein, or any of them, to desist from putting the said agreement in operation, or from doing any or either of the things provided for in said agreement.

And it further denies that either the proceedings had and taken by said Interstate Commerce Commission, as herein admitted, or any direction given pursuant thereto, were or are legally sufficient to warrant the institution, maintenance or prosecution of this suit."

395 FRANK LOOMIS,
Solicitor for the Deft.,
The N. Y. C. & H. R. R. R. Co.

I consent to the foregoing amendments.

WALLACE MACFARLANE,
U. S. Atty.

(Endorsed):--U. S. Circuit Court, Filed Apr. 10, 1896.—John A. Shields, Clerk.

396

400 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY, THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY
401 COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY;
402 THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY.

Defendants.

ANSWER OF DEFENDANT.

The Lake Shore & Michigan Southern Railway Company.

The answer of THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, one of the defendants in the above-entitled suit to the bill of complaint of the United States of America, complainant therein.

This defendant, now and at all times hereafter 403
saving and reserving to itself all and all manner of benefit, exception or advantages which can or may be had or taken to the many errors, uncertainties, insufficiencies or other imperfections, in the said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is or are necessary or material for it to make answer to, answering says:

I. That it admits:

That the several railroad companies, defendants herein, are incorporated as in said bill of complaint alleged.

That The Joint Traffic Association is a voluntary 404
association organized under certain "Articles of Organization," entered into and executed by the said several railroad and railway companies, on or about the nineteenth day of November, 1895, a copy of which is annexed to the said bill of complaint as Exhibit A, and that the principal place of business of said Joint Traffic Association is in the City of New York, in the Southern District of New York; but this defendant avers that the said Joint Traffic Association is not incorporated, is not a common carrier and is not engaged in the transportation of freight or passengers.

405

II.—This defendant further admits that all of said corporations defendant are common carriers and as such, at all the days and times mentioned in the bill of complaint and prior thereto, were and now are engaged in the transportation of freight and passengers, either separately or in connection with each other, continuously carried on among the several States of the United States, and among and between the several States of the United States and the Territories thereof, and between such States and Territories and foreign countries, and from places in the United States through foreign countries to other places in the United States.

406 But this defendant denies that any or either of said corporations have ever been otherwise engaged in interstate commerce, or that they, or any or either of them, have ever been engaged in any trade in or in relation to any article or commodity in anywise embraced within the operation or scope of said agreement.

III.—This defendant further admits that prior to the 19th day of November, 1895, the several railroad companies constituting what are termed in said agreement respectively the Baltimore and Ohio, the Chesapeake and Ohio, the Erie, the Grand Trunk, the Lackawanna, the Lehigh Valley, the
407 Pennsylvania, the Vanderbilt and the Wabash systems, with their leased, controlled, or operated lines, owned, operated and controlled separate railroad lines or systems, engaged with their connections independently in commerce among the States and Territories of the United States and with foreign nations and were in active competition with each other for such traffic, both in freight and passengers, and furnished to all persons engaged in such traffic or travel among the States and Territories of the United States separate and independent and competing lines of transportation in respect to the traffic in said bill mentioned; and this defendant avers that ever since the said 19th day of
408 November, 1895, the said railroad companies have continued to own, operate and control the same separate railroad lines or systems, engaged with their connections independently in said commerce, and that they have ever since continued to be and still are in active competition with each other for such traffic, and have ever since furnished and still continue to furnish to all persons engaged in such traffic or travel the same separate and independent and competing lines of transportation in respect to the traffic in said bill mentioned.

IV.—This defendant further admits and answers 409
that on or about the 19th day of November, 1895, the said railroad companies entered, as they were and are advised and believe they had a lawful right to do, into the certain contract, in the form of a written document, entitled "Articles of Organization of the Joint Traffic Association" hereinbefore mentioned.

But this defendant denies that the said contract is an unlawful contract in any of its provisions, or that it is or was intended to be a contract, agreement, combination or conspiracy to restrain trade or commeree among the several States, or was or is an attempt to monopolize, or does or will operate to monopolize, such trade or commerce, or is or was 410
intended to restrain or prevent legitimate competition among such railroads in respect to any inter-state trade or commerce, or does in any way restrain or prevent legitimate competition among said railroads in respect to any of such trade or commerce, or that the said companies or any or either of them in entering into said contract or at any time contrived or intended, or now intend to deprive the public, or have deprived the public engaged in any inter-state trade or transportation of any facilities or advantages which the said public theretofore had lawfully enjoyed from any independent competition of said railroads, or any or either of them, in respect to the traffic described in the bill of 411
complaint, or that the said companies, or any or either of them, at any time intended or now intend to establish or maintain rates of freight or passenger transportation fixed arbitrarily or uninfluenced by competition in respect to any traffic whatever; or that the effect of the said agreement is to establish or maintain rates of freight or passenger transportation fixed arbitrarily, or uninfluenced by competition in respect to any traffic whatever.

V.—This defendant admits that the said agreement establishes a Board of Managers consisting

412 of representatives of a number of the railroad companies or systems parties thereto, and that the agreement confers upon said Board of Managers the powers set forth in the said agreement, Exhibit A, annexed to the bill of complaint, for the provisions of which agreement this defendant begs leave to refer to the same. And this defendant denies each and every allegation of the bill of complaint imputing to the said agreement, or to the parties thereto any other agreement or intent than such as appears on the face thereof, and denies that the said Board of Managers, or any member thereof, has any power in regard to the subject matter embraced in the said agreement except as is
413 specifically granted to the said Board of Managers and the members thereof by the terms of the said agreement.

And this defendant denies that the said agreement confers upon the Board of Managers any right or authority to establish rates, fares, charges or rules for governing the traffic within the scope of the agreement.

VI.—This defendant further answering, denies that by the said agreement, or otherwise, the said companies, or any or either of them, surrendered to the said association any traffic whatever; or that it was or is the intention of said companies, or any or
414 either of them, or that it is or will be the effect of said agreement, to surrender to said association any traffic whatever.

VII.—This defendant admits that the traffic passing from, to or through the western termini of the trunk lines referred to in the said agreement constitutes a considerable and important part of all the freight and passenger traffic carried on between the several States and Territories of the United States, and between them and adjacent foreign countries, and that prior to the time when the said agreement went into effect the said rail-

road companies and systems, or many of them, 415
were in competition with each other for said traffic; but this defendant denies that such competition as conducted prior to the time when said agreement went into effect, resulted in advantage to the public engaged in such traffic or to the benefit or advantage of the people of the United States. And this defendant denies that said agreement was or is an oppressive or unlawful contract, agreement, combination or conspiracy.

VIII.—This defendant denies that in and by the terms of the said agreement attached to the bill of complaint, "Exhibit A," the said railroad companies, parties thereto, with the purpose of ter- 416
minating all or any competition among themselves for the freight and passenger traffic aforesaid, or for any purpose, unlawfully or otherwise, agreed to surrender the control of such traffic to the Board of Managers created by the terms of the said agreement, or agreed to terminate existing through co-operative or commission freight lines, although this defendant answers and admits that said companies, without any unlawful purpose, but as they were advised and believed and still are advised and believe they lawfully might do, agreed, for reasons of economy, to limit or terminate some or many of the powers or functions of existing through co-operative and commission freight lines, and, 417
except with the approval of the managers, to abandon all agencies for soliciting or contracting for any of the freight or passenger traffic within the scope of the said agreement, and to vest in the said Board of Managers full authority to organize joint freight and passenger agencies, as they might deem desirable; and that each and every of the said companies, in and by the said agreement, as they were advised and believed and still are advised and believe they lawfully might do, agreed not to maintain, directly or indirectly, in respect to the traffic covered by said agreement, any freight or

418 passenger agency except with the approval of the said Board of Managers, and to employ nobody in soliciting or contracting for any of such traffic to whom the said Board of Managers should object; but this defendant denies that the said companies, or any or either of them, in and by the said agreement or otherwise, surrendered to the said Board of Managers full or absolute control over all or any of the said competitive interstate traffic or commerce within the scope of said agreement, and this defendant avers that the sole purpose of the parties to the agreement in inserting the provisions therein contained relative to freight lines and agencies was, so far as they lawfully might, to prevent
419 illegitimate and ruinous competition, and the payment of rebates and commissions and the use of other subterfuges and secret practices which would result in unjust discriminations as between shippers and detriment to the public.

IX.—This defendant denies that in and by the said agreement the said companies, or any of them, unlawfully or in restraint of trade or commerce among the several States, or otherwise, agreed that the said Board of Managers should divide the said competitive traffic among the railroad companies, parties to the said agreement, in such proportions as the said Board of Managers should determine,
420 or that full control of any of the aforesaid competitive traffic was surrendered or entrusted by the terms of said agreement to the said Board of Managers; but this defendant admits that by said agreement it was provided that the Managers should be charged with the duty of securing to each of the companies parties thereto equitable proportions of the competitive traffic covered by said agreement so far as might be legally done; and this defendant denies that the said agreement unlawfully or otherwise combined a large or any part of the freight business of the said several competing railroads or railroad systems, or unlaw-

fully restrained or prevented competition among 421
the said railroads, or any or either of them in respect to any competitive traffic, or unlawfully restrained trade or commerce among the several States and Territories of the United States, or unlawfully or otherwise attempted to monopolize any part of such interstate trade or commerce.

X.—This defendant denies that the several railroad companies or systems, parties to the said agreement, or any or either of them, in or by the said agreement or otherwise, agreed that the Board of Managers created by said agreement and thereby charged with the execution thereof, should have power to establish the rates, fares or charges 422
for carrying such interstate traffic, either freight or passenger.

This defendant admits that the said agreement conferred upon said Board of Managers power to determine, when in their judgment necessary, the divisions of rates, fares and charges between connecting companies, parties to said agreement, and so far as practicable, between companies parties to said agreement and other railroad companies connecting with the parties to said agreement or any of them, keeping in view uniformity and the equities involved.

But this defendant answers and avers that the power conferred upon the said Board of Managers 423
to determine the divisions of rates and fares between the several railroad companies was not a power conferred upon the Board of Managers to fix or determine rates for through traffic over connecting lines, but only to fix and determine the *pro rata* share or division of such established through rates or fares to be apportioned to the several railroad companies owning or operating the connecting railroads constituting such through lines.

And this defendant denies that in or by the said agreement the said companies or any or either of

424 them unlawfully, or in restraint of interstate trade or commerce or otherwise contracted, agreed or combined among themselves for the division between them of a portion of the earnings of the said several railroad companies, parties to the said agreement. And further denies that the said companies or systems, parties to said agreement, or any or either of them, had any purpose to restrain interstate trade or commerce by unlawfully or otherwise pooling or combining any part thereof, for which, prior to the date of the said agreement the said railroads or systems, or any or either of them, were actively or independently competing.

And this defendant further denies that the
425 unrestrained and illegitimate competition for interstate trade and commerce by the several railroad companies and systems which prevailed prior to the first day of January, eighteen hundred and ninety-six, and which in the said bill of complaint is erroneously styled active and independent competition, was to the advantage of the public or the United States in facilities, rates, fares or charges or otherwise.

XI.—This defendant denies that in and by said agreement the railroad companies and systems aforesaid, parties thereto, agreed that any failure to abide by the rates, fares and charges to govern the inter-
426 state traffic and commerce aforesaid, as recommended by the Board of Managers aforesaid, should be deemed a violation of said agreement or articles of organization. But this defendant avers that it was provided by the said agreement that the Managers should from time to time recommend such changes in said rates, fares, charges and rules as might be reasonable and just and necessary for the governing of the traffic covered by the said agreement and for protecting the interests therein of the parties to the said agreement, and that the failure to observe such recommendations by any party to the said agreement as and when made should

be deemed a violation of the said agreement, and 427
that the company or companies committing such violation should be subjected to the fines and penalties, in said agreement mentioned.

But this defendant avers that such provision of said agreement is subject to and is qualified and modified by other provisions of said agreement, under and by virtue of which any railroad company may, so far as concerns itself, by action of its Board of Directors, and upon timely and reasonable notice, disapprove, deviate from and change the rates, fares, charges, and rules so recommended, without subjecting such company to any fine or penalty.

And this defendant denies that there was 428
any oppressive or illegal purpose whatever in agreeing to any of the provisions of the said agreement, or that any of the provisions of the said agreement were unjust, oppressive or unlawful, or that there was inserted in the said agreement any provision, the purpose or intention of which was, or which has the effect, to combine the freight and divide the earnings of the said railroad companies, parties thereto, or any portion thereof, or in any respect to restrain or monopolize trade or commerce among the several States and Territories of the United States.

XII.—This defendant answering the allegations 429
of the bill of complaint as to the right of any company to retire from the association created by said agreement, and as to the duration of the said agreement, begs leave to refer to the provisions of said agreement in that behalf; and this defendant admits that it is provided in the said agreement that the Board of Managers, therein created and charged with the duty of executing the same, should have their principal office in the City of New York, in the Southern District of New York, and that the said Board of Managers has been organized under said agreement, and did at

430 the time of the filing of the bill herein consist of the persons in that behalf mentioned in said bill of complaint; and that the said railroad companies have put into full operation all the provisions of their said agreement and, through the Board of Managers and other officers, hold meetings in the City of New York and Southern District of New York, but denies that such acts, or any of them, are done with any unlawful purpose or in any respect operated to any detriment or disadvantage of the public, or are in violation of any of the laws of the United States.

XIII.—And this defendant further answering, touching the matters and things alleged in the said bill of complaint, says: That the railroad systems
431 of the United States, and in particular those parts of the same which are embraced under the operation of the agreement mentioned in the said bill, had grown into the condition in which they were at the time of the making of the said agreement, by a long and gradual process, in obedience, partly to the necessities of trade and commerce, and partly to the supply of capital and the display of enterprise in furnishing railroad facilities for such trade and commerce; that the great lines of railroad in the United States, and in particular the trunk lines constituting the systems mentioned
432 in said bill of complaint, had been made up of roads originally constructed for comparatively short distances, and afterwards, from time to time lengthened-by additions, in some cases constructed by the same corporations by which the first roads were owned and in others by different corporations, and that the same had in like manner, from time to time, been enlarged and extended laterally and otherwise by new roads and extensions of roads, until the whole country had been covered by a network of lines which had, from time to time, by purchase, lease, merger, sale under the foreclosure of mortgages, and other methods of con-

solidation, been united under proprietorships very 433
few in number as compared with those constructing
and controlling the original parts; that the original
and separate roads were built from time to time in
response to the most pressing demands, because the
enterprise was promising and hopeful in point of
expected profit, and that the gradual consolida-
tion through the means above mentioned had been
shaped in accordance with the necessities arising
from the rapid growth of business, the building up
of towns and cities and the concentration of busi-
ness interests in the same; that originally trans-
portation for considerable distances could only be
had by successive dealings with different railroads
under different proprietorships and control, and so 434
required, to the great embarrassment of trade, fre-
quent changes of cars, by reason of difference in rail-
road gauge or refusal to interchange cars on roads of
equal gauges; that this embarrassment had become
aggravated by the circumstance that the tariffs of
rates were different upon different railroads and few,
if any, joint tariffs existed by which transportation
could be rapid, simple and convenient and the cost
thereof certain and known beforehand; that the dif-
ficulties and embarrassments thus encumbering the
trade and commerce of the country could be over-
come only as they had, in fact, been overcome, by the
consolidation of ownerships, or, where this was not
practicable, by conference, agreement and com- 435
munity of arrangement among the numerous inde-
pendent roads; that the trade and commerce of the
country absolutely required such conferences and
the making of mutual and harmonious arrange-
ments between railroads, and that for many years it
had been the practice with all well-conducted rail-
road companies to enter into such mutual arrange-
ments, for the purpose of facilitating their own
operations and accommodating the trade and com-
merce of the country; that without such mutual
arrangements it would have been wholly impossible
to move with efficiency the enormous traffic to

436 which the business of the country had given rise, and that the necessity for such arrangements had been universally acknowledged by all managers of railroad companies, by all shippers and other persons engaged in trade requiring the transportation of merchandise, by State legislatures in requiring railroad companies to make connections with each other and to allow the passage over one road of trains and cars belonging to another, and by the Congress of the United States in the passage of the act commonly known as the Interstate Commerce Act, and that the result of the system which had thus gradually grown up and been established has been such thorough and efficient means of trans-
437 portation by rail that the smallest article of traffic may be transported between points the most remote, on schedules and upon terms and at a cost known accurately in advance by the shipper.

XIV.—This defendant further avers that each of the defendant companies, parties to said agreement, is subject to the provisions of the Act to regulate commerce enacted by Congress for the regulation of the business of interstate transportation by rail; that the leading requirements of the said Act are, that all charges shall be reasonable and just; that all unjust discrimination shall be prohibited, and that no undue or unreasonable
438 preference or advantages shall be given; that in connection with the aforesaid provisions, and in aid of the enforcement thereof, all common carriers subject to said Act are thereby required to establish and print schedules showing the rates, fares and charges in force at any time for the transportation of persons and property, together with the classification of freight, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such rates, fares and charges; that the carriers are required to file these schedules with the Interstate Commerce Commission and to post copies thereof in their stations;

that the carriers are prohibited from changing such 439
schedules, except after ten days' like filing and posting in case of advances, and after three days' like filing and posting in case of reductions, and are also prohibited, under heavy penalties, from charging, demanding, collecting or receiving from any person or persons a greater or less compensation for the transportation of persons or property than is specified by the schedule in force at the time, to the end that no unjust discrimination, in the form of special rates, rebates, drawbacks or otherwise, shall be effected in favor of any shipper; that like provisions are also made in respect to joint traffic which passes over the line of more than one railroad in the course of its transportation, and 440
said Act also requires that reasonable, proper and equal facilities shall be afforded for the interchange of such joint traffic. That the defendant companies, by said Act, are also required to so establish said rates, rules, regulations and classifications of freight that no person, company, firm, corporation, locality or description of traffic shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; that said requirements involve not only the determination in advance of what is a just and reasonable rate upon every article of traffic from every point to every other point over the lines of each individual carrier, and over all joint lines, but also the establish-
ment of a vast number of rules and regulations 441
affecting the transportation of freight, which are necessary to prevent discrimination and favoritism among shippers, together with the classification which shall be employed in freight traffic, all of which must be done in such manner that no person, locality or description of traffic shall be subjected to prejudice or disadvantage in any respect whatsoever.

And this defendant avers that concerted action between the carriers is indispensable in order to comply with the aforesaid and other provisions of

442 the interstate commerce law; that the fixing of joint rates, and of a classification of freight for general use, is obviously a matter requiring mutual agreement, and the establishment of every joint rate also involves the fixing of divisions thereof; that for the establishment of tariffs to and from common points a preliminary agreement between the lines in interest is equally necessary, for the reason that unless tariffs for traffic common to two or more lines are equivalent, the business will all flow to the lines naming the lower rates, and other lines will be compelled at once to make reductions in their tariffs, a process which, if pursued, will speedily reduce the rates below a just and reason-
443 able compensation, and will lead to bankruptcies, involving either the extinction of routes or their absorption by competing routes; that the prohibition of preferences and advantages between localities, and in respect to particular descriptions of traffic, necessarily involves a preliminary establishment of the relations proper to be maintained; that such preferences and advantages are equally disastrous and illegitimate when they exist between the tariffs of two or three different carriers as when they appear upon the tariffs of a single carrier; that the Interstate Commerce Act absolutely requires that rates shall be fairly adjusted between localities, and between points of
444 production and consumption of all articles, many of which points are far removed from each other, and are situated upon different railroad lines; and that in the last-mentioned matter, which comprises a great part of the work of the Joint Traffic Association, the several carriers necessarily reflect the interest of shippers upon their respective lines, each official seeking to stimulate and increase the traffic of his own road.

XV.—And this defendant, further answering, avers that it has been a matter of official report by the Interstate Commerce Commission, and this de-

fendant is informed, and believes and avers, that for 445
several years prior to the 19th day of November, 1895, such part of commerce between the States and between the States and foreign countries as consisted of railroad transportation was in a demoralized condition, due in a very large measure to illegitimate competition; that such competition resulted on many lines in the cutting of rates, the giving of rebates and other secret advantages to shippers and numerous unfair practices in order to secure business; that traffic was by such lines often accepted at unremunerative prices in order to keep the railroads employed; that the object sought to be attained by the competing parties was not the benefit of the public or the earning of revenue so as to give 446
to the investor a reasonable and just rate of interest upon his investment, but to swell the volume of tonnage and the number of passengers carried upon individual roads without substantial increase of the volume of traffic upon the roads collectively, and without regard to the cost or the income produced; that such conditions resulted on some lines in great and useless damage to the way, bridges and superstructure of the railroads and great wear and tear to the rolling stock and other equipment consequent upon the carriage of an excessive volume of traffic at unremunerative rates, and the inability and failure to properly maintain the road and appurtenances and rolling stock and equipment; that 447
in consequence of this desire on the part of such railroad companies to obtain business large numbers of persons were employed as soliciting and contracting agents and in through co-operative and commission freight lines, the services of many of whom could with due regard to economy be dispensed with and most of whom in many cases would not have been employed, except as means of self-defense against the action of other companies suspected of illegitimate practices—all the above improper practices tending to, and sometimes resulting in, non-payment of divi-

448 dends, default of interest upon the bonds of railway companies, decrease of earnings, and deterioration and partial destruction of railway properties, impairment of the efficiency and safety of the public service, and great injury to the people of the United States.

And this defendant denies that the true interests of the general public in the operation of the railroads consists in obtaining rates and fares that are unreasonably low or unremunerative to the companies; and it insists, on the contrary, that the duty of the companies cannot be performed with due regard to the public interests upon any such terms, nor as this defendant is advised and believes, can
449 it long be so transacted at all.

And this defendant further avers that a demoralized condition of the business of railroad transportation, such as above described, must always result in rate wars and sudden and violent fluctuations in rates; and that great injury has been caused to the public as a result of the failure or inability of the companies engaged in interstate commerce to maintain reasonable and proper rates, fixed by general acquiescence in the fact of their reasonableness and propriety; that uniformity and stability in the rates of transportation are advantageous to the public, while the cutting of rates below what is reasonable and proper must always result in crip-
450 pling the companies engaged in transportation, in depriving them of the ability to transport reasonably and properly, and in such uncertainty on the part of shippers as must interfere with the safe and proper transaction of their business.

XVI.—And this defendant further answering says that the maintenance of soliciting or contracting passenger and freight agencies such as above mentioned and intended to be abolished by the said agreement, involved an annual expenditure approximating four millions of dollars, and that the suppression or abandonment of many of such agencies

will secure economy of administration and an ad- 451
vantageous result both to the companies and the shippers; that because of the remoteness of these agencies from the general offices of the companies, and the fact of their individual contact with shippers when dealing directly with them in reference to rates, it has become difficult to confine them in every instance to an observance of the provisions of the Act to regulate Commerce and other laws and regulations or to the instructions of the officers of the companies; and it was believed that the discontinuance of them in a large part and making the remainder subordinate to the Managers of the Traffic Association would, and this defendant avers that the same does, tend to an enforcement of the pro- 452
visions of the said Act to regulate Commerce, and in no wise violates the provisions of that or any other law.

This defendant says that the purpose of the parties to the said agreement in inserting the provisions therein contained relating to freight lines and agencies was to prevent, so far as possible, the payment of commissions and the use of other subterfuges, secret practices and methods resulting in the past in unjust discriminations between shippers and in great detriment to the public.

XVII.—And this defendant further answering says that in the course of the growth of the various 453
railroad systems hereinbefore mentioned, and as a result thereof, it had become apparent that certain of the competitive lines had indisputable advantages over others, either by reason of being shorter or superior in point of grade, or other particulars, and that the necessary tendency of such condition is that the superior lines should at equal rates attract the main body of the traffic; but that in railroad competition, unlike that prevailing in other branches of business, a company which may be unable to do business at a given rate must lower its rates, even though thereby it may be compelled to do its busi-

454 ness for less than the cost thereof, and that the result of such competition is to insure, if long continued, the bankruptcy and ruin of the weaker road, and either its destruction as a means of transportation or its absorption by its more powerful rivals, and the consequent extinguishment of competition to that extent.

And this defendant further says that the continuance of all the routes embraced by the systems mentioned in said bill of complaint is a great public advantage, inasmuch as there are periods in every year in which the pressure of traffic is so great as to bring into requisition all the facilities of all the lines, and that great and incalculable public injury
455 would result from the extinction of any such facilities, and that such injury would be fatal not only to those interests which embrace through traffic, but also all the local interests along the lines of such weaker routes.

And this defendant says that it has for many years past been found necessary in order to sustain such weaker routes and enable them to continue in operation and to perform their useful functions, that the disadvantages under which they labor should, in some measure, be recognized by voluntary concessions made by stronger roads for the purpose of securing to them a fair share of such through traffic as might not have been destined by the shippers
456 thereof for some particular route, and that the effect of such concessions has been salutary and for the interest not only of such weaker roads, but of the public at large.

XVIII.—And this defendant further answering says that the necessary demands of the trade and commerce of the country in connection with its system of railway transportation, hereinbefore mentioned, which can be satisfied only by concert of action between the various independent lines, and which have, in a certain measure, heretofore been accomplished by conference and agreement, have

not been fully and satisfactorily accomplished; and 457
that the object and purpose of the said agreement and of the various railroad companies, defendants herein, in entering into the same were to more fully and completely satisfy the requirements of the trade and commerce of the country in respect to railway transportation, and to check and remove, so far as possible, the disadvantages and mischiefs which would inevitably arise from the want of necessary concert of action and from illegitimate and ruinous competition.

That to this end the parties to said agreement reaffirmed the rates, fares, and charges and the rules applicable thereto which were in force and were authorized by the said companies, in respect to the 458
traffic covered by said agreement, at and prior to the making thereof. That said rates, fares, charges and rules were, and had been established by each corporation because they were reasonable, just and necessary, and schedules thereof had been duly filed with the Interstate Commerce Commission; and by said agreement the said companies provided a method by which the same could from time to to time be modified with due regard to the interests of all concerned; that power was, therefore, by the said agreement given to the Managers therein mentioned to recommend such changes in the said rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic covered 459
by the agreement and for protecting the interests of the parties to the said agreement therein, and that it was in and by the said agreement provided that any one of the companies, parties to said agreement, might, pursuant to the terms thereof by the action of its Board of Directors, disapprove of such recommendation, and that such disapproval should become effective thirty days after the receipt of such resolution of disapproval by the Board of Managers, and the powers of the said Board of Managers were in and by the said agreement expressly made subject to the provisions of the laws of the

460 United States; and the said agreement expressly provided that the powers conferred upon the Managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties thereto, and that the Board of Managers should co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established thereunder.

And this defendant further says that the powers granted in and by the said agreement to the Board of Managers in respect to recommending changes
461 in rates, fares, charges and rules, and the provisions of the said agreement relating to action to be taken upon such recommendation, were intended to promote the establishment of rates, fares, charges and rules which should be reasonable and just both to the transportation companies and shippers and passengers using the lines embraced within the scope of the said agreement, and this defendant believes and avers that such powers and provisions will promote the accomplishment of such purpose and intention by affording opportunity for the due consideration of the reasonableness of any proposed rate, fare, charge or rule by all the lines interested and an interchange of views on the effect of the
462 change recommended by the Board of Managers and at the same time, by checking strife and preventing illegitimate competition and sudden and selfish action, avert financial ruin to one or more of the competing companies and yet preserve to the public adequate facilities at fixed and reasonable prices and under stable and reasonable regulations.

And this defendant avers that a further practical effect of the provisions of said agreement relating to the power of said managers to recommend changes in said rates, fares, charges and rules is that in case, as is usual, any proposition

concerning the same shall involve discrimination 463
or prejudice to other points or on other lines, unless corresponding changes are elsewhere made, an opportunity is afforded, under the said agreement, for the reduction of rates, and for changes in rules and regulations, in such a way and manner as will maintain the due relations of rates, each with all others, and will prevent undue preference and advantage between individuals and between cities and towns, by making the reductions and changes, subject to the action of the respective boards of directors, effective over all lines at the same time.

And this defendant further avers that one of the practically injurious results to localities, of the conditions existing before and at the time of enter- 464
ing into the said agreement, arose from the fact that frequently two communities, or different parts of the same community, in a large sense interdependent, were each only accessible by a single line of railroad different from, and independent of, that serving the other; that unequal rates resulted, and great prejudice was caused to the locality served only by the independent line charging the higher rate or furnishing inferior facilities; that uniformity of rates and equality of facilities as between such independent lines were only attainable by such harmony of action as results from the existence of an association of the character established by the said agreement, and that the ten- 465
dency and effect of said agreement is to carry out and effectuate the purposes, in this regard, of the Act to regulate commerce.

And this defendant, further answering, avers that since the execution of the said agreement all the schedules aforesaid of rates, fares and charges and the rules applicable thereto, have been filed with the Managers of said Joint Traffic Association as provided in said agreement, and that the said rates, fares and charges and the rules applicable thereto are in all respects just and reasonable, have in no respects been disapproved by the said Interstate

466 Commerce Commission, and have been in all respects maintained and kept in force and effect, except that in some instances reductions of rates, fares and charges have been recommended by the said Managers of the Joint Traffic Association, and have been observed by the defendant corporations interested therein; but such reductions have been made not because the former rates were unreasonable or excessive, but for the purpose of avoiding or correcting discriminations, and securing uniformity of rates, or accommodating the changing necessities of business.

XIX.—And this defendant, further answering,
467 avers that the purpose and intention of the several railroad companies, parties to the said agreement, is honestly and fairly set forth in the body of said agreement, wherein it is provided, among other things, that the powers conferred upon the Managers of the said Joint Traffic Association shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or of any other law applicable to the premises, or any of the provisions of the charters or the laws of the companies, parties thereto, and that the Managers shall cooperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares and charges established under the said arti-
468 cles, and also in the preamble thereof wherein it is declared that the purposes of the said agreement are to aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and Interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service. And further avers that it is the purpose and intention of the said Joint Traffic Association and its Board of

Control and of its Board of Managers and 469
its several officers and of the several railroad companies, parties to the said agreement, fully, fairly and honestly to carry out the purposes stated in the said agreement, and that the said association, its boards and officers, and each and all of the said railroad companies, parties to the said agreement, have no other or different purpose or intention than in the said agreement and in this answer are set forth.

And this defendant denies the existence of any purpose, contract, agreement, contrivance, combination or conspiracy, in connection with the formation of the said Joint Traffic Association, or otherwise, to unjustly or oppressively increase or 470
augment the rates or fares charged for the transportation of interstate traffic, or to counteract the effect of free competition on the facilities or prices of transportation or to establish or maintain arbitrary or unreasonable rates or to prevent any one of the railroad companies, parties to the said agreement, from reducing rates, and it denies that by the formation of the said Joint Traffic Association the rates or prices for transporting traffic on any of the lines of the companies parties to the said agreement have been, or will be, unjustly, unreasonably or oppressively, increased or augmented; and it further denies the existence in connection with the formation of the said Joint Traffic Association, or 471
otherwise, of any intention to monopolize trade, traffic or commerce among or between the States, Territories or foreign countries in the bill of complaint mentioned and referred to, or that by reason of the formation of the said Joint Traffic Association or otherwise, such trade, traffic or commerce has been in fact or can or will be monopolized.

And this defendant says that while there is no requirement of law which establishes or requires free competition in the business of transportation, it was and is the intention of each of the companies parties to the said agreement to obtain for

472 itself all of said trade, traffic and commerce possible as against all other of such companies and all outside lines.

XX.—This defendant further says that while the lines enumerated in the said agreement and in the bill of complaint as being within the purview of the said agreement are lines of transportation and communication used for interstate commerce, they are not the only lines used or capable of being used within the same transportation territory for such traffic, but that there are several other lines which can be and are used for such traffic, and over which a large amount of such traffic has been transported
473 since the said agreement went into effect.

This defendant, further answering, says that the same separate, distinctive and competitive lines of transportation and communication extending among and between the States of the United States continue to exist as before the making of the said agreement of the 19th of November, 1895.

XXI.—And this defendant further avers that the several railroad companies, parties to the said agreement, intend to continue to be engaged independently in transportation among the States and Territories of the United States and with foreign nations, and to continue in active competition with
474 each other for traffic both in freight and passengers, and to furnish to all persons engaged in such traffic or travel among the several States and Territories of the United States separate and independent and competitive lines of transportation in respect to the traffic mentioned in the bill of complaint, and further intend that all charges made for any service rendered or to be rendered in the transportation of passengers or property among the States and Territories of the United States and with foreign countries, or in connection therewith, shall be reasonable and just, and that no unjust or unreasonable or unlawful charge for such service

shall be exacted ; and that it is not the purpose or 475
intention of any of the railroad companies, parties to the said agreement, directly or indirectly, either by themselves or through any board or officer of the Joint Traffic Association, or otherwise, by any special rate, rebate, drawback, or other device, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of the Interstate Commerce Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially 476
similar circumstances and conditions ; and that no undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, shall be made or given, or any particular description of traffic be subjected to any undue or unreasonable preference or disadvantage in any respect whatsoever, and that each and every carrier, party to the said agreement, shall and will, according to their and each of their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from 477
their several lines and those connecting therewith, and shall not discriminate in their rates or charges between such connecting lines, and that it is the intention of the railroad companies, parties to the said agreement, and each of them, not to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, except by authority of the Interstate Commerce Commission, and that it is not the pur-

478 pose or intention of any or either of the railroad companies, parties to the said agreement, to pool freights of different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion of them.

XXII.—And this defendant further says that the said agreement of the 19th of November, 1895, was duly filed with the Interstate Commerce Commission, as required by law.

And this defendant further answers that there is nothing in the said agreement contained, nor was it intended that there should be anything in its opera-
479 tion or effect, which will in any manner interfere with or tend to prevent the full performance by the companies parties thereto, respectively of all duties, imposed upon them or any of them by law, or the rendering of any service to the public which is or may be lawfully required of them or any or either of them in regard to the traffic covered by the said agreement.

XXIII.—And touching the allegations contained in the amendment to the bill of complaint, filed in this cause on the 9th day of March, 1896, this defendant says that it is informed and believes that on or about the 26th day of December, 1896, Wil-
480 liam R. Morrison, the Chairman of the Interstate Commerce Commission, addressed and delivered to the Attorney General of the United States a certain communication of which the following is a copy:

"INTERSTATE COMMERCE COMMISSION,
WASHINGTON, December 26, 1895.

Hon. JUDSON HARMON,
Attorney-General.

Dear Sir:

We have the honor to enclose herewith a copy of a contract, agreement, or arrangement entitled "Articles of Organization of the Joint Traffic

Association," entered into between certain common 481
carriers, corporations, named therein, forming said Joint Traffic Association, which is to take effect January 1st, 1896, and was filed with the Commission December 24, 1895. This contract, agreement, or arrangement is, we believe, in conflict with the Act to regulate commerce and cannot be carried into effect without violating the provisions of said Act.

Complying with the requirements of Section 12 of said Act, we have the honor to request that you will direct the U. S. District Attorney for the Southern District of New York or other proper jurisdiction to institute in the proper Court and prosecute under your direction all necessary proceedings, by 482
injunction or otherwise, to prevent the carrying into effect of said contract, agreement or arrangement as contemplated and provided for by said Articles of Organization, and for the punishment of all violations of said Act as the result of the formation of said Joint Traffic Association.

Respectfully,

WM. R. MORRISON,
Chairman.

But whether the said communication was so addressed and delivered by the authority of the Interstate Commerce Commission, this defendant 483
does not know, and has not been informed, save by the allegations of the said amendment to said bill.

And this defendant further answering, says that the railroad companies, parties to the said agreement, are common carriers, engaged in transporting persons and property among the several States and Territories of the United States, and as such common carriers are subject to the provisions of the Act of Congress, approved February 4, 1887, entited "An Act to regulate Commerce," with the various amendments and supplements thereto, and

484 that the said act and amendments and supplements thereto constitute a full, adequate and comprehensive system of regulation and the sole system of regulation which has been established by Congress for railroad companies as common carriers subject to said Act; and this defendant is informed and believes, and avers that no request has been made by the said Interstate Commerce Commission, created by said Act of Congress, to the District Attorney of the United States for the Southern District of New York, to institute or prosecute under the direction of the Attorney-General of the United States, this or any proceedings against this defendant, under the said Act of
485 Congress, approved February 4, 1887, entitled "An Act to regulate Commerce," and the several acts amendatory thereof and supplementary thereto, unless the said letter, a copy whereof is hereinabove set forth, be such a request, which this defendant is advised it is not, and this defendant will claim and insist upon the same benefit and advantage of such objection and omission as fully and completely as if this defendant had demurred to the said bill of complaint.

XXIV.—And this defendant further answering says that the railroad companies, parties to the said agreement, are not nor is either of them, nor is the
486 Joint Traffic Association, nor are its Boards or officers, or any or either of them, subject to the provisions of the Act of Congress entitled, "An Act to protect Trade and Commerce as against unlawful Restraints and Monopolies," approved July 2, 1890, and that the last mentioned act was not an amendment or modification of The Act to regulate Commerce, approved February 4, 1887, and does not relate to the business of common carriers, but has application solely to so-called trusts, industrial combinations and attempted monopolies, undertaken by persons or corporations engaged in trade, as manufacturers, miners, dealers in pro-

ducts, either in raw or manufactured state or otherwise, who carry on the actual transactions which constitute trade or commerce as distinguished from railway corporations, which are engaged in the business of transportation, and that the said agreement of November 19, 1895, does not relate to or affect any trade or commerce within the purview of the said Act, and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to the said bill of complaint. 487

XXV.—This defendant is advised and believes and insists that the complainant cannot in one and the same suit claim the relief prayed in said bill of complaint upon the ground that the said agreement is in violation of the said "Act to regulate Commerce," and may be restrained on the request of the Interstate Commerce Commission, and also upon the ground that the said agreement is in violation of the "Act to protect Trade and Commerce as against unlawful Restraints and Monopolies," and may be restrained on the demand of the Attorney-General, and also upon the general allegation that the said agreement is contrary to law and in violation of the rights of the citizens of the United States, and may be restrained without request or demand of any specified officer of the United States; that said alleged grounds of relief are distinct and separate, and cannot be united in the same suit; and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to the said bill of complaint. 488 489

XXVI.—And this defendant further answering says that it is advised and believes and insists that the complainant is not entitled to have or maintain its said suit or to any relief therein upon mere general allegations, such as contained in said bill, that the said agreement is unlawful, or without spe-

490 cifically alleging that it is in violation of some statute of the United States, and specifying the particular statute, and the particulars in which the said agreement is claimed to be in violation thereof; and this defendant will claim and insist upon the same benefit and advantage of this objection as fully and completely as if this defendant had demurred to the said bill of complaint.

XXVII.—And this defendant further answering says that it is advised and believes and insists that the complainant is not entitled to have or maintain its said suit, or to any relief therein, upon any allegation that the said agreement is in violation of
491 the rights of the citizens of the United States; and this defendant will claim and insist upon the same benefit and advantage of such objection as fully and completely as if this defendant had demurred to said bill of complaint.

And this defendant denies all and all manner of unlawful combination and conspiracy and confederacy wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing in the said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to the knowledge or belief of this
492 defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and prays to be dismissed hence.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,

[SEAL.] By E. D. WORCESTER,
Secretary.

GEO. C. GREENE,
Solicitor of the above-named Defendant,
and of Counsel.

The answer of the defendant, the Lake Shore 493
& Michigan Southern Railway Company, was taken this 21st day of March, in the year eighteen hundred and ninety-six, before me, under the common seal of the said corporation, as by their said seal affixed appears.

[SEAL] E. B. HOLBROOK,
Notary Public,
Kings Co.

Certificate filed in New York County.

STATE OF NEW YORK, }
City and County of New York, } *ss.*

494

EDWIN D. WORCESTER, being duly sworn, on his oath, saith that he is the Vice-President and Secretary of the Lake Shore & Michigan Southern Railway Company, the above-named defendant; that he has read the foregoing answer and knows its contents; that the same is true to the best of his knowledge, information and belief.

E. D. WORCESTER.

Sworn to before me this 21st }
day of March, 1896. }

[SEAL] E. B. HOLBROOK,
Notary Public,
Kings Co. 495

Certificate filed in New York County.

(Endorsed):—Circuit Court of the United States for the Southern District of New York. In Equity. The United States of America, Complainant, vs. The Joint Traffic Association, et al., Defendants.—Answer of Defendant, The Lake Shore & Michigan Southern Railway Company.—Geo. C. Greene, Solicitor for above named Defendant, 176 North St., Buffalo, N. Y.—U. S. Circuit Court, Filed Mar. 21, 1896.—John A. Shields, Clerk.

496 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, et al.

497 It is hereby stipulated that the answer of The Lake Shore and Michigan Southern Railway Company and the Pittsburg & Lake Erie Railroad Company, two of the defendants in the above-entitled cause, be amended as follows:

1. By striking out the first paragraph of Article XXIII. of the answer, and substituting in lieu thereof the following:

"And touching the allegations contained in the amendment to the bill of complaint, filed in this cause on the 9th day of March, 1896, this defendant says that it is informed and believes that on the 26th day of December, 1895, the Interstate
498 Commerce Commission made and entered on its records an order in substantially the following words:

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 26th day of December, A.D. 1895.

The Commission having under consideration the Articles of Organization of the Joint Traffic Association, it was

Ordered, that the following communication, enclosing copy of said Articles of Organization, be sent to the Attorney-General of the United States":

2. By striking out at the end of the communi- 499
cation above referred to, the words:

"But whether the said communication was so addressed and delivered by the authority of the Interstate Commerce Commission, this defendant does not know, and has not been informed, save by the allegations of the said amendment to said bill."

And inserting in lieu thereof the following:

"And this defendant is informed and believes that the chairman of said Interstate Commerce Commission did accordingly, on the same day, send to the Attorney-General of the United States the letter last above set forth, and that the Attorney-General received the same.

500

And this defendant is informed and believes that thereafter, and prior to the commencement of this suit, the said Attorney-General did direct the United States Attorney for the Southern District of New York to institute all necessary proceedings to prevent the parties to said agreement from carrying the same into effect, and to have the agreement declared null and void, both on the alleged ground that said agreement appeared to be in violation of the provisions of said Act to Regulate Commerce, as amended, and also in violation of the Act of July 2, 1890, entitled: 'An Act to protect Trade and Commerce against unlawful Restraints and Monopolies,' and on all other grounds, if any, 501
by reason of which the said agreement was contrary to law or in violation of the rights of the citizens of the United States.

But this defendant denies that the said Interstate Commerce Commission ever took any other action in the premises, or ever gave the defendants herein, or any of them, any notice of any such supposed investigation or order or report, or any opportunity to be heard in respect to the matter, or any part thereof, stated in the bill of complaint in this cause.

502 And this defendant denies that said Interstate Commerce Commission ever made any order or report, as required by law, requiring the defendants herein, or any of them, to desist from putting the said agreement in operation, or from doing any or either of the things provided for in said agreement.

And it further denies that either the proceedings had and taken by said Interstate Commerce Commission, as herein admitted, or any direction given pursuant thereto, were or are legally sufficient to warrant the institution, maintenance or prosecution of this suit."

FRANK LOOMIS,
503. Solicitor for the Deft.,
The N. Y. C. & H. R. R. R. Co.

I consent to the foregoing amendments.

WALLACE MACFARLANE,
U. S. Atty.

(Endorsed):—U. S. Circuit Court, Filed Apr. 10, 1896.—John A. Shields, Clerk.

504

IN THE CIRCUIT COURT OF THE UNITED STATES 505

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

No. . Of Sessions, 189 .

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE PENNSYLVANIA RAILROAD COMPANY et al. 506

The Pennsylvania Railroad Company, the Allegheny Valley Railway Company, the Philadelphia, Wilmington and Baltimore Railroad Company, the Terre Haute and Indianapolis Railroad Company, the Grand Rapids and Indiana Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, and the Toledo, Peoria and Western Railway Company, nine of the defendants in the above-named suit, 507 now and at all times hereafter saving and reserving to themselves and to each of them all and all manner of benefit, exception, or advantage which can or may be had or taken to the many errors, uncertainties, insufficiencies, and other imperfections in said bill of complaint, for answer thereunto, or unto so much or such parts thereof as these defendants are advised is necessary or material for them to answer, each for itself, say :—

I. These defendants admit all the averments in the bill concerning their organization, incorpora-

508 tion, existence and places of business, save that several of these defendants exist under and by virtue of concurrent legislation in a State or States additional to the particular State mentioned in the bill.

They further admit that the Joint Traffic Association is a voluntary association organized under certain articles, of which a copy is annexed to the bill of complaint as Exhibit A, executed by the several railroad and railway companies in the bill named, on or about the nineteenth day of November, 1895. The principal place of business of said Joint Traffic Association is correctly stated in the bill.

509 But these defendants expressly deny that the said Joint Traffic Association, as constituted by said articles of agreement, is a legal entity, or capable of recognition as such; and they further deny that such association can be legally made or considered a party defendant in this proceeding, or be legally made or considered as party plaintiff or defendant in any suit or proceeding, either at law or in equity, and further deny that said association is a common carrier, or is engaged either in transportation or trade.

II. These defendants admit that all the defendant corporations are common carriers, and that at
510 the dates and times mentioned in said bill, and prior thereto, they were, and now are, engaged in the transportation of freight and passengers in the way and manner therein set forth.

III. These defendants admit that prior to the nineteenth day of November, 1895, the corporations defendant in said bill named were, as is therein averred, engaged, with their connections, in the transportation of freight and passengers, independently, among the States and Territories of the United States and with foreign nations; and that prior to said date some of the parties defendant were en-

gaged in active competition with each other for 511
such traffic, and furnished to all persons interested in such traffic or travel, separate, independent, and competitive lines of transportation.

They further aver that since that date, continuously, until the present time, such of said defendants as were previously engaged in competition have continued to be engaged in similar active competition, and to furnish to all persons engaged in such traffic and travel separate, independent, and competitive lines of transportation in respect thereto.

They further aver that all of the said defendants, parties to the said agreement, intend to continue in like manner to be engaged in such competition and furnishing of separate, independent, and competi- 512
tive lines of transportation in respect to the traffic described in said bill.

They further aver that all the companies, parties to said agreement, intend to conduct their business of transportation in accordance with the provisions of the Interstate Commerce Act, or any other law applicable to the premises and in accordance with the provisions of their charters, respectively, and to co-operate with the Interstate Commerce Commission to promote the observance of all lawful conditions.

IV. These defendants admit that on or about the nineteenth day of November, 1895, all the railroad 513
and railway corporations, parties defendant in said bill named, did enter into the agreement, of which a copy marked "Exhibit A" is attached thereto. They aver that said agreement was entered into by the parties thereto for the purposes therein recited, and for none other; that said agreement embodies truthfully, fully and completely all the undertakings and agreements concerning the matters alleged in the bill into which said railway companies entered; that no other agreement in connection with the subject matter was entered into by or between said companies; and that no purposes or

514 n tentions were entertained, or sought to be furthered, by said agreement or deducible therefrom saving those in it recited. These defendants deny all the averments in the bill, of unlawful intent, and of an intent to restrain trade and commerce among the several States, and to monopolize the same.

They were advised by counsel before the making thereof, and still are advised and therefore aver, that the intent and scope of said agreement, and of the parties who made it, was, and is, lawful.

V. These defendants deny the following specific averments of the bill:--

1. That said agreement was intended to restrain
515 and prevent competition among the railroads in respect to interstate trade and commerce.

2. That the railroad companies, parties to said agreement, intended to deprive the public engaged in interstate trade and transportation, of the facilities and advantages which the public had theretofore enjoyed from their independent competition.

3. That said companies intended to establish or maintain rates of freight and passenger transportation fixed arbitrarily, uninfluenced by competition.

4. That said railroad companies entered into a combination or conspiracy to restrain trade and commerce among the several States.

5. That said agreement was entered into in order
516 to terminate competition amongst the parties thereto for freight and passenger traffic, and that it did terminate the same.

6. That the parties to said agreement unlawfully, or in any way otherwise, pooled or combined any portion of their transportation of interstate commerce.

7. That the parties to said agreement undertook to combine their freight or to divide their earnings, or any portion thereof.

VI.—These defendants deny all the allegations in said bill contained of terms or conditions of said

agreement of the 19th of November, 1895, other 517
than those in said agreement contained. They aver that said agreement was the only one entered into by said railroad companies concerning its subject matter, and plead the terms, and the plain meaning thereof, in contradiction of the averments of said bill, that there was some other agreement, and that the agreement entered into was made with any intent or for any purpose not expressed therein.

VII.—These defendants aver that said agreement was not intended to, and did not, deprive the public engaged in interstate trade and transportation of any facilities and advantages which had been theretofore enjoyed by it from the independent com- 518
petition of said railroads. They deny that said agreement was intended to, or did, establish or maintain rates of freight and passenger transportation, fixed arbitrarily and uninfluenced by competition. They aver that on the contrary, the rates of freight and passenger transportation by said agreement adopted were those which had been theretofore fixed by the various railroad companies and posted and filed with the Interstate Commerce Commission, and were reasonable and just, and so accepted. They deny that said agreement conferred upon the board of managers the powers in said bill averred, or any powers, other than those stated therein.

These defendants deny that said agreement made 519
any surrender of competitive traffic to said association, saving to the extent, and in the way and manner, therein set forth.

VIII.—These defendants deny that by virtue of said agreement the parties thereto were subjected to any fines or penalties other than those in the agreement specified. They further deny that said fines and penalties were to be inflicted by reason of any acts other than those therein specified.

These defendants admit that the board of managers for which provision was made in said articles

520 of association has been organized in the way and manner averred in said bill; and that the parties to said agreement have put into operation the provisions thereof. They deny, however, that they entertained or entertain any unlawful purpose, or that anything by them intended to be done, or which will be done, under and by virtue of said agreement, will operate to the detriment or disadvantage of the public, or will be in violation of the law of the United States.

IX.—These defendants deny that they, or any of the parties to said agreement, intended or intend to interfere with, or in any way to restrain, any reason-
521 able or proper competition between the various companies engaged in competitive interstate commerce. They aver that all such competition will be continued, that separate, independent and competitive lines of transportation will be maintained and operated as heretofore, and that said agreement will not in anywise interfere therewith. They aver, however, that not more than about twenty per cent. of all the traffic of all the companies parties to said agreement is embraced in or would be affected by the said agreement.

They further aver that the maintenance of soliciting or contracting passenger and freight agencies intended to be abolished by the agreement involved
522 an annual expenditure approximating $4,000,000, and the abolishment of agencies will secure economy of administration accordingly, and an advantageous result both to the companies and the shippers; that because of the remoteness of these agencies from the general offices of the company, and the fact of their individual contact with the shippers when dealing directly with them with reference to rates, it had become most difficult to confine them to an observance of the provisions of the Act to regulate commerce and other laws and regulations; and their abolition in a large part and making them subordinate to the managers of the Traffic Association

was believed, and it is averred tended to an en- 523
forcement of the provisions of the said Act to regulate commerce, and in no wise violated any of the provisions of that or any other law.

These defendants aver that the sole purpose of the parties to the said agreement, in inserting the provisions therein contained relating to freight lines and agencies, was to check, to such an extent as might be lawful, the payment of commissions, and the use of such other subterfuges and secret practices and employment of such methods as had resulted, in the past, in unjust discriminations between the shippers and in detriment to the public.

X.—These defendants aver that great injury 524
would ensue to the public as the result of a failure on the part of the different companies engaged in interstate commerce to maintain reasonable and proper rates, fixed by general acquiescence in the fact of their reasonableness and propriety. Uniformity and stability in the rates of transportation are far more advantageous to the public than those cuttings of rates below what is proper and reasonable, which have terminated in the past, and, will always terminate in the future, in crippling the companies engaged in transportation, in depriving them of the ability to transport reasonably and properly, and in such uncertainty on the part of shippers as must interfere with the safe and proper 525
transaction of their business.

XI.—These defendants aver that by virtue of the agreement complained of the various parties thereto provided for the adoption, in the first instance, of rates which had been fixed upon because they were reasonable, and which has been duly filed with the Interstate Commerce Commission. By virtue of said agreement they provided a method by which these rates could, from time to time, be modified with due regard to the interest of all concerned. They reserved to each of the various par-

526 ties to the agreement, through its Board of Directors, the exercise of the power to control the rates to be by it charged in the future.

The practical effect of the provisions of said agreement relating to the powers and duties of the Board of Managers is to afford opportunity for the consideration of the reasonableness of any proposed rule or regulations by all lines interested. In case, as is usual, any proposition concerning the same shall involve discrimination or prejudice to other points or on other lines, unless corresponding changes are elsewhere made, an opportunity is afforded, under the articles, for the reduction of rates, and for changes in rules and regulations, in
527 such a way and manner as will maintain the due relations of rates each with all others, and will prevent undue preference and advantage between individuals and between cities and towns by making the reductions and changes subject to the action of the respective Boards of Directors effective at the same time by and over all lines.

And these defendants further aver that one of the practically injurious results to localities of the conditions existing before and at the time of entering into the joint traffic agreement, arose from the fact that frequently two communities, or different parts of the same community, in a large sense interdependent, were each only accessible by a
528 single line of railroad different from, and independent of, that serving the other. Unequal rates resulted, and great prejudice inured to the locality served only by the independent line charging the higher rate or furnishing inferior facilities. Uniformity of rates and equality of facilities as between such independent lines were only attainable by such harmony of action as results from the making of an association of the character established by the joint traffic agreement, by reason whereof the tendency and effect of said association is to carry out and effectuate the purposes, in this regard, of the Act to regulate commerce.

XII.—These defendants aver that so much of 529
said agreement as provided for the termination of some, or many, of the existing through co-operative and commission freight lines, resulted solely from a desire to secure economies beneficial to the companies; uniformity and equality in the facilities for transportation and the exclusion of "inside freight lines" not controlled by the companies owning and operating the railroads.

XIII.—These defendants aver that the power conferred upon the Board of Managers to determine the divisions of rates and fares between the several railroad companies was not a power conferred on said board to fix or determine rates for 530
through traffic over competing lines, but only to fix and determine the *pro rata* share or division of such established through rates or fares earned by the several railroad companies owning or operating the connecting railroads which constituted the respective through lines.

XIV.—These defendants aver that the object of the parties who entered into said agreement was to bring about a co-operation which would lead to the maintenance of reasonable and just rates, fares, rules and regulations of interstate traffic; would prevent unjust discrimination; would secure the reduction and concentration of agencies, and 531
the introduction of economies in the conduct of interstate commerce; would secure a stability and uniformity of rates which, as they are advised, was one of the leading purposes of the Interstate Commerce Act; and would insure a full, fair and honest carrying out of the purposes in said agreement set forth.

XV.—These defendants aver that the purposes of the Interstate Commerce Act will be promoted by the carrying out of the agreement complained of; and that the spirit of said Act can only properly be

carried out by conferences between the various companies engaged in said commerce, and by a concert of action resulting from such conferences.

XVI.—These defendants further aver that each of the defendant companies, parties to said agreement, is subject to the provisions of the Act to regulate commerce established by Congress for the regulation of the business of interstate transportation by rail; that the leading requirements of the said Act are, that all charges shall be reasonable and just; that all unjust discrimination shall be prohibited; and that no undue or unreasonable preference or advantages shall be given. In connection with the establishment of the aforesaid provisions, and in aid of the enforcement thereof, all common carriers subject to said Act are thereby required to establish and print schedules showing the rates, fares, and charges in force at any time for the transportation of persons and property, together with the classification of freight, and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such rates, fares and charges. These schedules they are required to file with the Interstate Commerce Commission and to post in their stations. They are prohibited from changing such schedules except after ten days' like filing and posting in case of advances, and after three days' like filing and posting in case of reductions. They are also prohibited, under heavy penalties, from charging, demanding, collecting, or receiving from any person or persons a greater or less compensation for the transportation of persons or property than is specified by the schedule in force at the time, to the end that no unjust discrimination, in the form of special rates, rebates, drawbacks, or otherwise, shall be effected in favor of any shipper. Like provisions are also made in respect to joint traffic which passes over the line of more than one railroad in the course of its transportation. Said Act

also requires that reasonable, proper, and equal 535
facilities shall be afforded for the interchange of such joint traffic.

The defendant companies, by said Act, are also required to so establish said rates, rules, regulations and classifications of freight that no person, company, firm, corporation, locality, or description of traffic shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Said requirements involve not only the determination in advance of what is a just and reasonable rate upon every article of traffic from every point to every other point over the lines of each individual carrier, and over all joint lines, but also the establishment of a vast 536
number of rules and regulations affecting the transportation of freight, which are necessary to prevent discrimination and favoritism among shippers, together with the classification which shall be employed in freight traffic, all of which must be done in such manner that no person, locality or description of traffic shall be subjected to prejudice or disadvantage in any respect whatsoever.

Concerted action between the carriers is indispensable in order to comply with the aforesaid and other provisions of the interstate commerce law. The fixing of joint rates, and of a classification of freight for general use, is obviously a matter requiring mutual agreement, and the establishment of 537
every joint rate also involves the fixing of divisions thereof. For the establishment of tariffs to and from competing points a preliminary agreement between the lines in interest is equally necessary, for the reason that unless tariffs or traffic common to two or more lines are equivalent, the business will all flow to the line or lines naming the lowest rates, and other lines will be compelled at once to make reductions in their tariffs, a process which, if pursued, will speedily reduce the rates below a just and reasonable compensation, and will lead to bankruptcies, involving either the

538 extinction of routes or their absorption by competing routes. The prohibition of preferences and advantages between localities, and in respect to particular descriptions of traffic necessarily involves a preliminary establishment of the relations proper to be maintained. Such preferences and advantages are equally disastrous and illegitimate when they exist between the tariffs of two or three different carriers as when they appear upon the tariffs of a single carrier. The provisions of the interstate commerce law constitute an absolute requirement that rates shall be fairly adjusted between localities, and between points of production and consumption of all articles, many of which
539 points are far removed from each other, and are situated upon different railroad lines. In the last-mentioned matter, which comprises by far the greater part of the work of the Joint Traffic Association, the several carriers necessarily reflect the interest of shippers upon their respective lines, each official seeking to stimulate and increase the traffic of his own road.

XVII.—These defendants are advised, and therefore aver, that under the Act to regulate commerce it was not lawful to institute this suit without the existence of certain prerequisite conditions, which conditions they aver did not exist at the time of,
540 or prior to, its institution.

These prerequisite conditions are: An investigation and determination by the Interstate Commerce Commission concerning the matter claimed to be in violation of said Act; a report in writing by said Commission in respect thereto; an entry of record of such report; the furnishing of a copy thereof to the common carrier or carriers concerned; a notice to said common carrier or carriers to cease and desist from doing what has been found by the Commission to be in violation of said Act; a failure by said common carrier or carriers to comply with such notice; and a request by said Com-

mission to the District Attorney of the United 541
States for the proper district to institute proceedings in the proper court to compel the enforcement of the provisions of said Act concerning the matter found by the Commission to be violative thereof.

These defendants are further advised, and therefore aver, that under the Act to regulate commerce this suit could not be brought excepting upon the request to the said District Attorney by the Interstate Commerce Commission after action officially taken by it concerning the subject matter of such request. They have no knowledge or information that such action was ever taken by said Interstate Commerce Commission. They therefore deny that such action was taken. 542

And these defendants further deny that the said United States Attorney for the Southern District of New York, in the institution and prosecution of said suit, has acted, or is acting, under any lawful request of the Interstate Commerce Commission. And further, these defendants deny that any such action or proceedings had been had or taken by the said Interstate Commerce Commission prior to the institution of this suit as would warrant, agreeably to the requirements of law, any request or authority to the said United States Attorney for the Southern District of New York for its institution or prosecution. And they further deny the lawful power and warrant of the Attorney-General 543
of the United States to direct said United States Attorney for the Southern District of New York to institute the same; and further deny that the said suit can be lawfully prosecuted.

XVIII.—These defendants expressly deny that they, or either of them, are engaged in trade or commerce among the several States, and aver that they are only engaged in transportation; and they likewise deny that either the said agreement mentioned in complainant's bill, or anything to be accomplished thereunder or to result therefrom, is

544 within the scope and purview of the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2d, 1890.

XIX.—These defendants deny that there can be lawfully included and united in the same bill, against the same defendants, causes of action originating by request of the Interstate Commerce Commission, acting under authority of the Act to Regulate Commerce, and its supplements, for alleged violation of said law by common carriers subject thereto; and also causes of action originating by direction of the Attorney-General of the
545 United States for alleged violations of the Act of July 2d, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

These defendants pray the same benefit and advantage of the facts and things herein set forth as if, for the reasons thereof they had either moved to dismiss or demurred to the said bill of complaint where a motion to dismiss or demurrer had been proper; and the same benefits and advantages thereof as if they had specially pleaded to said bill; and on information and belief deny every allegation in said bill of complaint not hereinbe-
546 fore admitted, answered, or denied.

Wherefore these defendants pray to be hence dismissed with all reasonable costs and charges in this behalf most wrongfully sustained.

ROBINSON, BIDDLE & WARD,
Solicitors for Defendants above named.

E. RANDOLPH ROBINSON,
JOHN G. JOHNSON,
JAMES A. LOGAN,
GEORGE F. EDMUNDS,
Of Counsel for above-named Defendants.

STATE OF PENNSYLVANIA, } ss. 547
City of Philadelphia, }

Personally appeared before me, the undersigned, a notary public in and for the city and county of Philadelphia and State of Pennsylvania, George B. Roberts, who, being duly sworn, doth depose and say that he is the president of each of the following corporations, parties to the foregoing answer, viz.: the Pennsylvania Railroad Company, the Philadelphia, Wilmington & Baltimore Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that the other corporations, parties to said answer, are affiliated in interest with some 548
one or more of the said corporations whereof he is president as aforesaid; that he has read the foregoing answer and is acquainted with its contents, and that the facts set forth in the foregoing bill are correct and true so far as they were within the knowledge of this affiant, and in so far as they have been stated on advice of counsel and information he verily believes the same to be true.

Sworn and subscribed before me, this day of , A.D. 1896.

549

550 (Endorsed):—No. Of Sessions, 189 .—In the Circuit Court of the United States for the Southern District of New York. In Equity.—The United States of America vs. The Joint Traffic Association, the Pennsylvania Railroad Company, et al.—Joint and Several Answer of the Pennsylvania Railroad Company, the Allegheny Valley Railway Company, the Philadelphia, Wilmington and Baltimore Railroad Company, the Terre Haute and Indianapolis Railroad Company, the Grand Rapids and Indiana Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, and the Toledo, Peoria and Western Railway Company to the
551 Bill of Complaint.—Robinson, Biddle & Ward, Solicitors for above-named Defendants.—John G. Johnson, James A. Logan, George F. Edmunds, of Counsel for above-named Defendants.—U. S. Circuit Court, Filed Mar. 23, 1896. —John A. Shields, Clerk.

552

CIRCUIT COURT OF THE UNITED STATES 553

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE PENNSYLVANIA RAILROAD COMPANY et al.

It is hereby stipulated that the answer of The Pennsylvania Railroad Company, Allegheny Valley 554
Railway Company, Northern Central Railway Company, Pennsylvania Company, Philadelphia, Wilmington & Baltimore Railroad Company, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, Terre Haute & Indianapolis Railroad Company, Toledo, Peoria & Western Railway Company, Grand Rapids & Indiana Railroad Company, defendants in the above-entitled cause, be amended as follows:

By adding at the end of Paragraph XVII. the words:

"These defendants admit that they have been informed since the filing of their answer in this 555
cause, and believe that on the twenty-sixth day of December, 1895, the said Interstate Commerce Commission made and entered on its records an order in substantially the following words:

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 26th day of December, A.D. 1895.

The Commission having under consideration the Articles of Organization of the Joint Traffic Association, it was

Ordered, that the following communication, enclosing copy of said Articles of Organization, be sent to the Attorney-General of the United States":

556 INTERSTATE COMMERCE COMMISSION.

WASHINGTON, December 26, 1895.

Hon. JUDSON HARMON,
Attorney-General.

Dear Sir:

We have the honor to enclose herewith a copy of a contract, agreement or arrangement, entitled "Articles of Organization of the Joint Traffic Association," entered into between certain common carriers, corporations, named therein, forming said Joint Traffic Association, which is to take effect January 1st, 1896, and was filed with the Commission December 24, 1895. This contract, agreement, or arrangement is, we believe, in conflict with the
557 Act to Regulate Commerce and cannot be carried into effect without violating the provisions of said Act.

Complying with the requirements of Section 12 of said Act, we have the honor to request that you will direct the U. S. District Attorney for the Southern District of New York or other proper jurisdiction to institute in the proper Court and prosecute under your direction all necessary proceedings, by injunction or otherwise, to prevent the carrying into effect of said contract, agreement or arrangement as contemplated and provided for by said Articles of Organization, and for the punishment of all violations of said Act as the result of the
558 formation of said Joint Traffic Association.

Respectfully,
WM. R. MORRISON,
Chairman.

"And these defendants are informed and believe that the chairman of said Interstate Commerce Commission did accordingly, on the same day, send to the Attorney-General of the United States the letter last above set forth, and that the Attorney-General received the same.

And these defendants are informed and believe that on the day of , 189 , the said Attor-

ney-General sent to the District Attorney of the 559
United States for the Southern District of New York the letter of W. R. Morrison, Chairman, last above set out, with instructions to institute appropriate proceedings under all existing legislation to have said contract declared void, and the parties thereto restrained from carrying out the same.

But these defendants deny that the said Interstate Commerce Commission ever took any other action whatever in the premises, or ever gave these defendants, or any of them, any notice of any such supposed investigation or order or report, or any opportunity to be heard in respect of the matter, or any part thereof, stated in the Bill of Com- 560
plaint in this cause.

And these defendants deny that said Interstate Commerce Commission ever made any order or report, as required by law, requiring these defendants, or any of them, to desist from putting the said agreement in operation, or from doing either, or any, of the things provided for in said agreement.

And they further deny that either the proceedings had and taken by said Interstate Commerce Commission, as herein admitted, or any direction given pursuant thereto, were or are legally sufficient to warrant the institution, maintenance or prosecution of this suit."

Dated, New York City, April 10, 1896. 561

WALLACE MACFARLANE,
U. S. Attorney.

ROBINSON, BIDDLE & WARD,
Solicitors for said Defendants.

(Endorsed):—U. S. Circuit Court, S. D. N. Y.—United States, Plff., vs. Joint Traffic Association, Pennsylvania R. R. Co. et al., Defts.—Amendment to Answer.—Robinson, Biddle & Ward, Solicitors for P. R. R.—U. S. Circuit Court, Filed Apr. 13, 1896.—John A. Shields, Clerk.

562 IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

No. . Of Sessions, 189 .

THE UNITED STATES OF AMERICA,

vs.

563 THE JOINT TRAFFIC ASSOCIATION, THE PENNSYLVANIA RAILROAD COMPANY et al.

The separate answer of the Lehigh Valley Railroad Company, one of the defendants, to the bill of complaint of the United States of America.

This defendant, now and at all times hereafter saving and reserving to itself all and all manner of benefit, exception, or advantage which can or may be had or taken to the many errors, uncertainties, insufficiencies, and other imperfections in said bill of complaint, for answer thereunto, or unto so much
564 or such parts thereof as this defendant is advised is necessary or material for it to answer, says:

I.—This defendant admits all the averments in the bill concerning its organization, incorporation, existence and place of business.

It further admits that the Joint Traffic Association is a voluntary association organized under certain articles, of which a copy is annexed to the bill of complaint as Exhibit A, executed by the several railroad and railway companies in the bill named, on or about the nineteenth day of November, 1895, and that the principal place of business of said

Joint Traffic Association is in the City of New 565
York.

But this defendant expressly denies that the said Joint Traffic Association, as constituted by said articles of agreement, is incorporated either by special charter or by public statute, and denies that it is a legal entity, or capable of recognition as such; and it further denies that such association can be legally made or considered a party defendant in this proceeding, or be legally made or considered as party plaintiff or defendant in any suit or proceeding, either at law or in equity; and it denies that said Association is a common carrier, or engaged in the transportation of freight or passengers, or engaged in trade or commerce of any 566
description whatever.

II.—This defendant admits that all the railroad companies defendants are common carriers, incorporated in the way and manner in said bill set forth; and that at the dates and times mentioned in said bill, and prior thereto, they were, and now are, engaged in the transportation of freight and passengers in the way and manner therein set forth.

III.—This defendant admits that prior to the nineteenth day of November, 1895, the corporations defendant in said bill were, as is therein averred, 567
engaged, with their connections, not in trade, but in the transportation of freight and passengers, independently, among the States and Territories of the United States and with foreign nations; and that prior to said date some of the parties defendant were engaged in active competition with each other for such traffic, and furnished to all persons interested in such traffic or travel, separate, independent and competitive lines of transportation.

It further avers that since that date, continuously, until the present time, such of said defendants as were previously engaged in compe-

568 tition have continued to be engaged in similar active competition and to furnish to all persons engaged in such traffic and travel separate, independent and competitive lines of transportation in respect thereto.

It further avers that all of the said defendants, parties to the said agreement, intend to continue in like manner to be engaged in such competition and furnishing of separate, independent and competitive lines of transportation in respect to the traffic described in said bill.

It further avers that all the companies, parties to said agreement, intend to conduct their business of transportation in accordance with the provis-
569 ions of the Interstate Commerce Act, or any other law applicable to the premises and in accordance with the provisions of their charters, respectively, and to co-operate with the Interstate Commerce Commission to promote the observance of all lawful conditions.

IV.—This defendant admits that on or about the nineteenth day of November, 1895, all the railroad and railway corporations, parties defendant in said bill named, did enter into the agreement, of which a copy, marked "Exhibit A," is attached thereto. It avers that said agreement was entered into by the parties thereto for the purposes therein
570 recited, and for none other; that said agreement embodies truthfully, fully, and completely all the undertakings and agreements concerning the matters alleged in the bill into which said railway companies entered; that no other agreement in connection with the subject matter was entered into by or between said companies; and that no purposes or intentions were entertained, or sought to be furthered, by said agreement or deducible therefrom saving those in it recited. This defendant denies all the averments in the bill, of unlawful intent, and of an intent to restrain trade and commerce among the several States, and to monopolize the same.

It was advised by counsel before the making 571
thereof, and still is advised and therefore avers, that the intent and scope of said agreement, and the intent of the parties who made it, were, and are, lawful.

V.—This defendant denies the following specific averments of the bill:

1. That said agreement was intended to restrain and prevent competition among the railroads in respect to interstate trade and commerce.

2. That the railroad companies, parties to said agreement, intended to deprive the public engaged in interstate trade and transportation of the facilities and advantages which the public had thereto- 572
fore enjoyed from their independent competition.

3. That said companies intended to establish or maintain rates of freight and passenger transportation fixed arbitrarily, uninfluenced by competition.

4. That said railroad companies entered into a combination or conspiracy to restrain trade and commerce among the several States.

5. That said agreement was entered into in order to terminate competition amongst the parties thereto for freight and passenger traffic, and that it did terminate the same.

6. That the parties to said agreement unlawfully, or in any way otherwise, pooled or combined any 573
portion of their transportation of interstate commerce.

7. That the parties to said agreement undertook to combine their freight or to divide their earnings, or any portion thereof.

VI.—This defendant denies all the allegations in said bill contained, of terms or conditions of said agreement of the 19th of November, 1895, other than those in said agreement contained. It avers that said agreement was the only one entered into by said railroad companies, concerning its subject

matter, and pleads the terms, and the plain meaning thereof, in contradiction of the averments of said bill, that there was some other agreement, and that the agreement entered into was made with any intent or for any purpose not expressed therein.

VII.—This defendant avers that said agreement was not intended to, and did not, deprive the public engaged in interstate trade and transportation of any facilities and advantages which had been theretofore enjoyed by it from the independent competition of said railroads. It denies that said agreement was intended to, or did, establish or maintain rates of freight and passenger transportation, fixed arbitrarily and uninfluenced by competition. It avers that, on the contrary, the rates of freight and passenger transportation by said agreement adopted were those which had been theretofore fixed by the various railroad companies, and posted and filed with the Interstate Commerce Commission, and were reasonable and just, and so accepted. It denies that said agreement conferred upon the Board of Managers the powers in said bill averred, or any powers, other than those stated therein.

This defendant denies that said agreement made any surrender of competitive traffic to said association, saving to the extent, and in the way and manner, therein set forth.

VIII.—This defendant denies that by virtue of said agreement the parties thereto were subjected to any fines or penalties, other than those in the agreement specified. It further denies that said fines and penalties were to be inflicted by reason of any acts other than those therein specified.

This defendant admits that the Board of Managers for which provision was made in said articles of association has been organized in the way and manner averred in said bill, and that the

parties to said agreement have put into operation 577
the provisions thereof. It denies, however, that they entertained or entertain any unlawful purpose, or that anything by them intended to be done, or which will be done, under and by virtue of said agreement, will operate to the detriment or disadvantage of the public, or will be in violation of the law of the United States.

IX.—This defendant denies that it or any of the parties to said agreement intended or intend to interfere with, or in any way to restrain, any reasonable or proper competition between the various companies engaged in competitive interstate commerce. It avers that all such competition will be 578
continued, and that said agreement will not in anywise interfere therewith. It avers, however, that not more than about 20 per cent. of all the traffic of all the companies parties to said agreement is embraced in or would be affected by the said agreement.

It further avers that the maintenance of soliciting or contracting passenger and freight agencies intended to be abolished by the agreement involved an annual expenditure approximating $4,000,000, and the abolishment of agencies will secure economy of administration accordingly, and an advantageous result both to the companies and the shippers; that because of the remoteness of these agencies 579
from the general offices of the company, and the fact of their individual contact with the shippers when dealing directly with them with reference to rates, it had become most difficult to confine them to an observance of the provisions of the Act to regulate commerce and other laws and regulations; and their abolition in large part, and making them subordinate to the managers of the Traffic Association were believed, and it is averred, tended to an enforcement of the provisions of the said Act to regulate commerce, and in nowise violated any of the provisions of that or any other law.

580 This defendant avers that the sole purpose of the parties to the said agreement, in inserting the provisions therein contained relating to freight lines and agencies, was to check, to such an extent as might be lawful, the payment of commissions, and the use of such other subterfuges and secret practices and employment of such methods as had resulted, in the past, in unjust discrimination between the shippers and in detriment to the public.

X.—This defendant avers that great injury would ensue to the public, as the result of a failure on the part of the different companies engaged in interstate commerce to maintain reasonable and proper
581 rates, fixed by general acquiescence in the fact of their reasonableness and propriety. Uniformity and stability in the rates of transportation are far more advantageous to the public than those cuttings of rates below what is proper and reasonable, which have terminated in the past, and will always terminate in the future, in crippling the companies engaged in transportation, in depriving them of the ability to transport reasonably and properly, and in such uncertainty on the part of shippers as must interfere with the safe and proper transaction of their business.

XI.—This defendant avers that by virtue of the
582 agreement complained of, the various parties thereto provided for the adoption, in the first instance, of rates which had been fixed upon because they were reasonable, and which had been duly filed with the Interstate Commerce Commission. By virtue of said agreement they provided a method by which these rates could, from time to time, be modified with due regard to the interests of all concerned. They reserved to each of the various parties to the agreement, through its board of directors, the exercise of the power to control the rates to be by it charged in the future.

The practical effect of the provisions of said 583
agreement relating to the powers and duties of the board of managers is to afford opportunity for the consideration of the reasonableness of any proposed rule or regulations by all lines interested. In case, as is usual, any proposition concerning the same shall involve discrimination or prejudice to other points or on other lines, unless corresponding changes are elsewhere made, an opportunity is offered, under the articles, for the reduction of rates, and for changes in rules and regulations, in such a way and manner as will maintain the due relations of rates each with all others, and will prevent undue preference and advantage between individuals and between cities and towns by making the reduc- 584
tions and changes (subject to the action of the respective boards of directors) effective at the same time by and over all lines.

And this defendant further avers that one of the practically injurious results to localities of the conditions existing before and at the time of entering into the joint traffic agreement arose from the fact that frequently two communities, or different parts of the same community, in a large sense interdependent, were each only accessible by a single line of railroad different from, and independent of, that serving the other. Unequal rates resulted, and great prejudice inured to the localities served only by the independent line charging the higher rate or 585
furnishing inferior facilities. Uniformity of rates and equality of facilities as between such independent lines were only attainable by such harmony of action as results from the making of an association of the character established by the joint traffic agreement, by reason whereof the tendency and effect of said association is to carry out and effctuate the puposes, in this regard, of the act to regulate commerce.

XII.—This defendant avers that so much of said agreement as provided for the termination of some,

586 or many, of the existing through co-operative and commission freight lines, resulted solely from a desire to secure economies beneficial to the companies, uniformity and equality in the facilities for transportation, and the exclusion of "inside freight lines" not controlled by the companies owning and operating the railroads.

XIII.—This defendant avers that the power conferred upon the board of managers to determine the divisions of rates and fares between the several railroad companies was not a power conferred on said board to fix or determine rates for through traffic over competing lines, but only to fix
587 and determine the *pro rata* share or division of such established through rates or fares earned by the several railroad companies owning or operating the connecting railroads which constituted the respective through lines.

XIV.—This defendant avers that the object of the parties who entered into said agreement was to bring about a co-operation which would lead to the maintenance of reasonable and just rates, fares, rules and regulations of interstate traffic; would prevent unjust discrimination; would secure the reduction and concentration of agencies, and the introduction of economies in the conduct of
588 interstate commerce; would secure a stability and uniformity of rates which, as they are advised, was one of the leading purposes of the Interstate Commerce Act; and would insure a full, fair and honest carrying out of the purposes in said agreement set forth.

XV.—This defendant avers that the purposes of the Interstate Commerce Act will be promoted by the carrying out of the agreement complained of; and that the spirit of said Act can only properly be carried out by conferences between the various companies engaged in said commerce, and by a concert of action resulting from such conferences.

XVI.—This defendant further avers that each of 589
the defendant companies, parties to said agreement, is subject to the provisions of the Act to regulate commerce established by Congress for the regulation of the business of interstate transportation by rail; that the leading requirements of the said Act are that all charges shall be reasonable and just, that all unjust discrimination shall be prohibited, and that no undue or unreasonable preference or advantages shall be given. In connection with the establishment of the aforesaid provisions, and in aid of the enforcement thereof, all common carriers subject to said Act are thereby required to establish and print schedules showing the rates, fares and charges in force at any time for the transportation 590
of persons and property, together with the classification of freight, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such rates, fares and charges. These schedules they are required to file with the Interstate Commerce Commission and to post in their stations. They are prohibited from changing such schedules except after ten days' like filing and posting in case of advances, and after three days' like filing and posting in case of reductions. They are also prohibited, under heavy penalties, from charging, demanding, collecting or receiving from any person or persons a greater or less compensation for the transportation 591
of persons or property than is specified by the schedule in force at the time, to the end that no unjust discrimination, in the form of special rates, rebates, drawbacks or otherwise, shall be effected in favor of any shipper. Like provisions are also made in respect to joint traffic which passes over the line of more than one railroad in the course of its transportation. Said act also requires that reasonable, proper and equal facilities shall be afforded for the interchange of such joint traffic.

The defendant companies, by said Act, are also required to so establish said rates, rules, regula-

592 tions and classifications of freight that no person, company, firm, corporation, locality or description of traffic shall be subject to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Said requirements involve not only the determination in advance of what is a just and reasonable rate upon every article of traffic from every point to every other point over the lines of each individual carrier, and over all joint lines, but also the establishment of a vast number of rules and regulations affecting the transportation of freight, which are necessary to prevent discrimination and favoritism among shippers, together with the classification which shall
593 be employed in freight traffic, all of which must be done in such manner that no person, locality or description of traffic shall be subjected to prejudice or disadvantage in any respect whatsoever.

Concerted action between the carriers is indispensable in order to comply with the aforesaid and other provisions of the interstate commerce law. The fixing of joint rates, and of a classification of freight for general use, is obviously a matter requiring mutual agreement, and the establishment of every joint rate also involves the fixing of divisions thereof. For the establishment of tariffs to and from competing points a preliminary agreement between the lines in interest is equally neces-
594 sary, for the reason that unless tariffs for traffic common to two or more lines are equivalent, the business will all flow to the line or lines naming the lowest rates, and other lines will be compelled at once to make reductions in their tariffs, a process which, if pursued, will speedily reduce the rates below a just and reasonable compensation, and will lead to bankruptcies, involving either the extinction of routes or their absorption by competing routes. The prohibition of preferences and advantages between localities, and in respect to particular descriptions of traffic necessarily involves a preliminary establishment of the relations

proper to be maintained. Such preferences and 595
advantages are equally disastrous and illegitimate when they exist between the tariffs of two or three different carriers as when they appear upon the tariffs of a single carrier. The provisions of the interstate commerce law constitute an absolute requirement that rates shall be fairly adjusted between localities, and between points of production and consumption of all articles, many of which points are far removed from each other, and are situated upon different railroad lines. In the last-mentioned matter, which comprises practically all of the work of the Joint Traffic Association, the several carriers necessarily reflect the interest of shippers upon their respective lines, 596
each official seeking to stimulate and increase the traffic of his own road.

XVII.—These defendants are advised, and therefore aver, that under the Act to regulate commerce it was not lawful to institute this suit without the existence of certain prerequisite conditions, which conditions they aver did not exist at the time of, or prior to, its institution.

These prerequisite conditions are: An investigation and determination by the Interstate Commerce Commission concerning the matter claimed to be in violation of said Act; a report in writing by said Commission in respect thereto; an entry 597
of record of such report; the furnishing of a copy thereof to the common carrier or carriers concerned; a notice to said common carrier or carriers to cease and desist from doing what has been found by the Commission to be in violation of said Act; a failure by said common carrier or carriers to comply with such notice; and a request by said Commission to the District Attorney of the United States for the proper district to institute proceedings in the proper court to compel the enforcement of the provisions of said Act concerning the matter found by the Commission to be violative thereof.

598 These defendants are further advised, and therefore aver, that under the Act to regulate commerce this suit could not be brought excepting upon the request to the said District Attorney by the Interstate Commerce Commission after action officially taken by it concerning the subject matter of such request. They have no knowledge or information that such action was ever taken by said Interstate Commerce Commission. They therefore deny that such action was taken.

And these defendants further deny that the said United States Attorney for the Southern District of New York, in the institution and prosecution of said suit, has acted, or is acting, under any lawful
599 request of the Interstate Commerce Commission. And further, these defendants deny that any such action or proceedings had been had or taken by the said Interstate Commerce Commission prior to the institution of this suit as would warrant, agreeably to the requirements of law, any request or authority to the said United States Attorney for the Southern District of New York for its institution or prosecution. And they further deny the lawful power and warrant of the Attorney-General of the United States to direct said United States Attorney for the Southern District of New York to institute the same; and further deny that the said suit can be lawfully prosecuted.

600

XVIII.—And this defendant, further answering, says that the railroad companies parties to the said agreement are not, nor is either of them, nor is the Joint Traffic Association, nor are its boards or officers, or any or either of them, subject to the provisions of the Act of Congress entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2d, 1890, and that the last-mentioned Act was not an amendment or modification of the Act to regulate commerce, approved February 4th, 1887, and does not relate to the business of common carriers, but has

application solely to so-called trusts, industrial combinations, and attempted monopolies undertaken by persons or corporations engaged in trade as manufacturers, producers or dealers, who carry on the actual transactions which constitute trade or commerce, as distinguished from railway corporations, which are engaged in the business of transportation, and that the said agreement of November 19th, 1895, does not relate to or affect any trade or commerce within the purview of the said Act. 601

XIX.—And this defendant, further answering, says that it is advised, and therefore avers, that there cannot be lawfully included and united in the same bill of complaint causes of action originating or alleged to originate by reason of alleged violation of the provisions of the aforesaid "Act to regulate commerce" and its supplements, and causes of action originating or alleged to originate by reason of alleged violation of the provisions of the aforesaid "Act to protect trade and commerce against unlawful restraints and monopolies." 602

This defendant prays the same benefit and advantage of the facts and things herein set forth as if, for reason thereof it had demurred to said bill of complaint where a demurrer had been proper; and the same benefits and advantages thereof as if it had specially pleaded to said bill; and on information and belief denies every allegation in said bill of complaint not hereinbefore admitted, answered, or denied. 603

604 Wherefore this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

LEHIGH VALLEY RAILROAD COMPANY,

SEAL Lehigh Valley Railroad Company.

By

E. P. WILBUR,
President.

Attest:

JNO. R. FANSHAWE,
Secretary.

ALEXANDER & GREEN,
605 Solicitors for Defendant above-named.

JOHN G. JOHNSON,
C. B. ALEXANDER,
FRANCIS I. GOWEN,
Of Counsel.

606

The answer of the defendant, the Lehigh Valley Railroad Company, was taken this twenty-third day of March, in the year 1896, before me, under the common seal of the said corporation, as by their said seal affixed appears. 607

EDWARD Y. HARTSHORNE,
[Notarial Seal.] Notary Public.

STATE OF PENNSYLVANIA, } ss.
County of Philadelphia, }

E. P. WILBUR, being duly sworn according to law, deposes and says that he is the President of the Lehigh Valley Railroad Company, the defendant above-named, and that the allegations of the foregoing answer of said defendant so far as they are therein stated of his own knowledge are true, and so far as therein stated upon information and belief he believes them to be true. 608

E. P. WILBUR.

Sworn and subscribed before me, this twenty-third day of March, 1896. Witness my hand and notarial seal.

EDWARD Y. HARTSHORNE,
[Notarial Seal.] Notary Public. 609

(Endorsed):—No. Of Sessions, 189 .—In the Circuit Court of the United States for the Southern District of New York. In Equity.—The United States of America vs. The Joint Traffic Association, the Pennsylvania Railroad Company, et al.—Separate Answer of the Lehigh Valley Railroad Company.—Alexander & Green, Solicitors for above-named Defendant.—John G. Johnson, C. B. Alexander, Francis I. Gowen, of Counsel for above-named Defendant.—U. S. Circuit Court, Filed Mar. 24, 1896.—John A. Shields, Clerk.

610 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, THE LEHIGH VALLEY RAILROAD COMPANY et al.

611

It is hereby stipulated that the answer of the defendant, the Lehigh Valley Railroad Company, be amended as follows:

By adding at the end of Paragraph XVII. of said answer, the following:

"This defendant admits that it has been informed since the filing of its answer in this cause, "and believes, that on the twenty-sixth day of "December, 1895, the said Interstate Commerce "Commission made and entered on its records an "order in substantially the following words:

612 "'At a General Session of the Interstate Com- "'merce Commission, held at its office in Wash- "'ington, D. C., on the 26th day of December, "'A. D. 1895.

"'The Commission having under consideration "'the Articles of Organization of the Joint Traffic "'Association, it was ordered that the following "'communication, enclosing a copy of said Articles "'of Organization, be sent to the Attorney-General "'of the United States:

" ' INTERSTATE COMMERCE COMMISSION, 613
" ' WASHINGTON, December 26, 1895.

" ' Hon. JUDSON HARMON,
Attorney General.

" ' Dear Sir:

" ' We have the honor to enclose herewith a copy
" ' of a contract, agreement or arrangement entitled,
" ' ARTICLES OF ORGANIZATION OF THE JOINT
" ' TRAFFIC ASSOCIATION, entered into between cer-
" ' tain common carriers, corporations named there-
" ' in, forming said Joint Traffic Association, which
" ' is to take effect January 1st, 1896, and was filed
" ' with the Commission December 24th, 1895.
" ' This contract, agreement or arrangement is, we
" ' believe, in conflict with the Act to Regulate 614
" ' Commerce, and cannot be carried into effect
" ' without violating the provisions of said Act.

" ' Complying with the requirements of Section
" ' 12 of said Act, we have the honor to request
" ' that you will direct the U. S. District Attorney
" ' for the Southern District of New York, or
" ' other proper jurisdiction, to institute in the
" ' proper court and prosecute under your direc-
" ' tion, all necessary proceedings, by injunction or
" ' otherwise, to prevent the carrying into effect of
" ' said contract, agreement or arrangement as con-
" ' templated and provided for by said Articles of
" ' Organization, and for the punishment of all vio-
" ' lations of said Act as the result of the formation 615
" ' of said Joint Traffic Association.' "

Respectfully,

WM R. MORRISON,
Chairman.

"And this defendant is informed and believes
"that the Chairman of said Interstate Commerce
"Commission did accordingly, on the same day,
"send to the Attorney General of the United States
"the letter last above set forth, and that the At-
"torney General received the same.

616 "And this defendant is informed and believes
"that on the day of , 189 , the said At-
"torney General sent to the District Attorney of
"the United States for the Southern District of
"New York, the letter of W. R. Morrison, Chair-
"man, last above set out, with instructions to insti-
"tute appropriate proceedings under all existing
"legislation to have said contract declared void,
"and the parties thereto restrained from carrying
"out the same.

"But this defendant denies that the said Inter-
"state Commerce Commission ever took any other
"action whatever in the premises, or ever gave
"this defendant any notice of any such supposed
617 "investigation, or order or report, or any oppor-
"tunity to be heard in respect of the matter or any
"part thereof, stated in the Bill of Complaint in
"this cause.

"And this defendant denies that said Interstate
"Commerce Commission ever made any order or
"report, as required by law, requiring this defend-
"ant to desist from putting the said agreement
"in operation, or from doing either or any of the
"things provided for in said agreement.

"And it further denies that either the proceed-
"ings had and taken by said Interstate Commerce
"Commission as herein admitted, or any direction
"given pursuant thereto, were or are legally suffi-
618 "cient to warrant the institution, maintenance or
"prosecution of this suit."

ALEXANDER & GREEN,
Solrs. for Deft., L. V. R. R.

I consent to the foregoing amendments.

WALLACE MACFARLANE,
U. S. Atty.

(Endorsed):—U. S. Circuit Court, Southern Dist. of New York.—The United States of America vs. The Joint Traffic Association, The Lehigh Valley Railroad et al.—Stipulation Amending Answer.—U. S. Circuit Court, Filed Apr. 11, 1896.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 619
SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, et al.

It is stipulated and agreed between the parties to this stipulation, that in preparing the Record on Appeal herein, the Clerk of the Court shall include 620
in the record the answer as amended, filed by the Lake Shore and Michigan Southern Railway Company, one of the defendants herein, and shall omit the answer as amended of the Pittsburg and Lake Erie Railroad Company; and it is agreed for the purposes of this appeal that the Pittsburg and Lake Erie Railroad Company filed an amended answer under its corporate seal and verified by one of its principal officers, identical in form and effect with that filed by the said Lake Shore and Michigan Southern Railway Company.

It is further agreed that the Record thus constituted shall have the same force and effect as if the answer as amended, of each of the defendants here- 621
in named, had been included in the Record.

September 19, 1896.

WALLACE MACFARLANE,
U. S. Attorney,
Attorney for Plaintiff.

GEO. C. GREENE,
Atty. for Lake Shore & Michigan Southern Railway Co., and Pittsburg & Lake Erie R. R. Co.

(Endorsed):—U. S. Circuit Court, filed Sept. 19, 1896.—John A. Shields, Clerk.

622 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

vs.

THE JOINT TRAFFIC ASSOCIATION, et al.

It is stipulated and agreed between the parties to
623 this stipulation, that in preparing the Record on Appeal herein, the Clerk of the Court need include in the record only a copy of the answer as amended, filed by the Joint Traffic Association, and a copy of the amended answer of the New York Central & Hudson River Railroad Company, one of the defendants herein; and that it is agreed for the purposes of this appeal that the Delaware, Lackawanna & Western R. R. Co., the Lake Shore & Michigan Southern Railroad Co., the Pittsburg & Lake Erie Railroad Company, the Central Railroad of New Jersey, the Wabash Railroad Company, the Chesapeake & Ohio Railway Co., the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., the
624 Erie Railroad Company, the Chicago & Erie Railroad Co., the West Shore Railroad Co., the New York, Ontario & Western Railway Co., the Michigan Central Railroad Co., the New York, Chicago & St. Louis Railroad Co., the Grand Trunk Railway Co. of Canada, the Chicago & Grand Trunk Railroad Co., the Detroit, Grand Haven & Milwaukee Railway Co., the Baltimore & Ohio Railroad Co., the Baltimore & Ohio Southwestern Railway Co., and the Pittsburg & Western Railway Co., each filed an amended answer under its corporate seal and verified by one of its principal officers, identical in form and effect with that filed by the

New York Central & Hudson River Railroad Company, hereinbefore mentioned. 625

It is further agreed that the Record thus constituted shall have the same force and effect as if the answer as amended of each of the defendants herein named, had been included in the Record.

September 5, 1896.

WALLACE MACFARLANE,
U. S. Attorney,
Attorney for the Plaintiff.

CARTER & LEDYARD,
Attys. for The Joint Traffic Association. 626

HAMILTON ODELL,
Atty. for Delaware, Lackawanna & Western R. R. Co.

Atty. for Lake Shore & Michigan Southern R. R. Co., and Pittsburg & Lake Erie R. R. Co.

DE FOREST BROTHERS,
Attys. for Central R. R. Co. of New Jersey.

W. H. BLODGETT & CLARENCE D. ASHLEY,
Attys. for Wabash R. R. Co. 627

FRANK LOOMIS,
Sol. for New York Central & Hudson River R. R. Co.
By ASHBEL GREEN.

STETSON, TRACY, JENNINGS & RUSSELL,
Attys. for Chesapeake & Ohio R'y Co., Cleveland, Cincinnati, Chicago, & St. Louis R'y Co., Erie R. R Co., Chicago & Erie R. R. Co.

628 ASHBEL GREEN,
Solicitor for West Shore R. R. Co., New York, Ontario & Western R. R. Co., Michigan Central R. R. Co., New York, Chicago & St. Louis R. R. Co., Grand Trunk R'y Co. of Canada, Chicago & Grand Trunk R'y Co., Detroit, Grand Haven & Milwaukee R'y Co.

E. J. D. CROSS.
HUGH L. BOND, Jr.,
Solicitors for Baltimore & Ohio R. R. Co., Baltimore & Ohio Southwestern
629 R'y Co., Pittsburg & Western R'y Co.

(Endorsed):—U. S. Circuit Court, Filed Sep. 18, 1896. John A. Shields, Clerk.

630

UNITED STATES CIRCUIT COURT, 631

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES, *vs.* JOINT TRAFFIC ASSOCIATION.	In Equity.

The Interstate Commerce Law, 24 Stat., 379, provides:

"Sec. 5. That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence." 632

The Act of 1890 against unlawful restraints and monopolies, 26 Stat., 209, provides:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal." 633

The thirty-two railroad companies defendants, immensely engaged in competitive interstate commerce, have made an arrangement forming this Joint Traffic Association, with a board of nine managers, consisting of one each from the Baltimore & Ohio, Chesapeake & Ohio, Erie, Grand Trunk, Lackawanna, Lehigh Valley, Pennsylvania, Vander-

634 bilt and Wabash systems; and with jurisdiction over competitive traffic which passes to, from or through the western termini of the Trunk Lines, viz.: Toronto, Can.; Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk and Salamanca, N. Y.; Erie, Pittsburg and Allegheny, Pa.; Bellaire, O.; Wheeling, Parkersburg, Charleston and Kenova, W. Va., and Ashland, Ky.; and such other points as may hereafter be designated by the Managers as such termini.

The arrangement provides as to rates, fares, charges and rules.

635 Article Seven:

"Section 1. The duly published schedules of rates, fares and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), are hereby reaffirmed by the companies composing the Association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares and charges, and the rules applicable thereto.

636 "Section 2. The Managers shall from time to time recommend such changes in said rates, fares, charges and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made, shall be deemed a violation of this agreement. No company, party hereto shall, through any of its officers or agents, deviate from or change the rates, fares charges or rules herein reaffirmed or so recommended by the Managers, except by a resolution of its Board. The action of

such Board shall not effect the rates, fares, charges 637
or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the Board of any company party hereto, authorizing any such change shall be immediately forwarded by the company making the same, to the Managers, and such change shall not become effective until thirty days after the receipt of such resolution by the Managers. The Managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.

"Section 3. The powers conferred upon the Managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or 638
any provision of the charters or the laws applicable to any of the companies parties hereto, and the Managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules, established hereunder."

It also provides as to competitive traffic.

Article Eight:

"The Managers are charged with the duty of securing to each company party hereto, equitable proportions of the competitive traffic covered by this Agreement, so far as can be legally done; and 639
the control of all persons acting as contracting and soliciting freight and passenger agents in relation to the traffic covered, with due regard to the relative interests involved; and the number of such persons to be employed, is given to the Managers."

This bill is brought at the request of the Interstate Commerce Commission, under the direction of the Attorney General, by the District Attorney of the United States for this district, against this agreement, as made, without counting upon any statutes, or alleging anything actually done under

640 it to be of itself unlawful otherwise than because so done. The answer denies, as a conclusion, any illegality within or under the agreement; and, as a matter of fact, anything unlawful outside of or beyond it. The case has been heard upon the bill and answer, and so is made to turn upon the question of the legality or illegality of the contract, and upon the right of the United States as plaintiff to maintain this suit, if it is illegal. The provisions of the contract stated are understood to be the ones challenged as being contrary to the statutes quoted.

The restraint and monopoly Act expressly authorizes such a proceeding in equity as this to prevent its violation, and this suit is well maintained if
641 this contract is within it. Railroads are not expressly named in this Act, and are said in argument not to be within its terms. No one is so named; but it applies to all contracts and combinations in restraint of trade or commerce among the States. Railroads do not trade among the States, but they carry for those who do; and what would restrain their so carrying would seem to be a restraint of such commerce.

These provisions of the contract do not provide for lessening the number of carriers; nor their facilities; nor for raising their rates, except expressly by its terms not contrary to law, and therefore not beyond what are reasonable. The Interstate
642 Commerce Law, Section 1, requires all rates to be reasonable, and the making of reasonable and lawful rates upon carriage in any traffic cannot be any restraint in law upon such traffic. U. S. *vs.* Trans-Missouri Freight Association, 53 Fed. Rep., 440; 58 Fed. Rep., 58. The soliciting of custom is no part of the duty of common carriers, and dispensing with soliciting agents or with the control of them cannot be illegal, nor an agreement to do so be an illegal contract. As this case rests wholly upon the contract as made, and not upon anything actually done under color of, or beyond it, and each road is

left by it to carry on its own business within lawful limits as before, no unlawful restraint of commerce seems to be provided for by it; and no ground for relief under that statute of 1890 is made out. 643

No provision is made by the Interstate Commerce Law for enforcing its provisions in equity, except to carry out orders of the Commission; and authority for this suit to restrain any violation of that law, must appear otherwise, or fail. That Governments and States exercising general municipal control over the people, their property, their rights and their convenience may, by their law officers, maintain suits in equity to restrain actual nuisances to ways, parks, commons, and the like, which are injurious to the common rights of all to their enjoyment, is not to be questioned. The United States Government is limited in such control to such particular subjects as are committed to it, which include, of course, interstate and foreign commerce, carrying the mails, and such. These railroads are not federal instruments, although they may be and probably are engaged in the business of, and are within control of the laws of, the government to some extent. As so engaged no nuisance would be federal till it should become actual by obstructing these functions. *In re* Debs, 58 U. S., 564. This contract, if illegal, is intangible, and is not alleged, or claimed, to have obstructed the roads for government purposes in any manner whatever. 644 645

The United States may maintain a bill in equity to repeal a patent for land, U. S. *vs.* San Jacinto Tin Co., 125 U. S., 273; or a patent for an invention, U. S. *vs.* Bell Telephone Co., 128 U. S., 315; and a State to protect its interest in components of the soil under its navigable waters, Coosaw Mining Co. *vs.* South Carolina, 144 U. S., 550; or to prevent abuse of charters granted by it, Attorney General *vs.* Railroad Companies, 35 Wis., 524, because of the interest in the property as proprietor or in the

646 grant as a party to it. But here the United States is not alleged, or understood, to have granted the charters of, or to have any proprietary interest in, any of these railroads; or to have any other concern about them, in any respect involved here, but to have its prohibitory statutes for regulating commerce between the States respected and obeyed, the same as that those against counterfeiting, or tampering with the mails, should be. Breaches of such statutes are misdemeanors punishable by indictment or information; and that merely such are not preventible in equity is elementary. A plaintiff in equity for relief by injunction should have some right or interest in the subject of prevention, or be
647 given express authority to proceed in that way by statute. Authority is given to the Interstate Commerce Commission to have proceedings for the enforcement of that law taken and prosecuted, but that is understood to refer to the usual and appropriate proceedings in such cases, and seem not to authorize any that are unknown there. The right given here is to prosecute, but not to provide, remedies.

If this is erroneous, only such agreements are prohibited as are for the pooling of freights, or dividing aggregate, or net proceeds of, earnings. So far as this agreement goes each road carries the freights it may get, over its own line, at its own
648 rates, however fixed, and has the proceeds, net or other, of the earnings to itself. Very able judicial opinions, and learned commentaries and disquisitions upon pooling, too numerous for separate notice herein, have been referred to, but none make it include what is left in wholly separate channels. Provision for reasonable, although equal or proportional, rates for each carrier; or for a just and proportional rate for each carrier; or for a just and proportional division of traffic among carriers, does not seem to be either a pooling of their traffic or freights; or a division of the net proceeds of their earnings, in any sense.

This statement of reasons seems quite inadequate 649
to the very full and able argument upon which this case has on each side been presented; but these conclusions have been reached upon full consideration of all, so far as understood; and, as they appear to be sufficient for the disposition of the case, no more is attempted.

Bill dismissed.

HOYT H. WHEELER.

WALLACE MACFARLANE,
U. S. Attorney, for Plaintiff.

JAMES C. CARTER,
EDWARD J. PHELPS, 650
GEORGE F. EDMUNDS, by brief,
For Defendants.

(Endorsed):—U. S. Circuit Court, South. Dist. of New York.—United States vs. Joint Traffic Association.—Opinion, WHEELER, *J.*—U. S. Circuit Court, Filed May 28, 1896.—John A. Shields, Clerk.

651

652 At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Rooms of said Court in the Post Office Building, in the City of New York, on the 12th day of June, 1896.

Present.—Hon. HOYT H. WHEELER,
Judge.

THE UNITED STATES OF AMERICA,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY, THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY; THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY.

653

654

IN EQUITY.

The above entitled cause having been set down 655
by the complainants for hearing upon the bill of complaint and the answers thereto, as amended, and having come on to be heard at this Term upon the said bill of complaint and the answers thereto, as amended, and having been argued by counsel and due deliberation having been had thereon, it is

Ordered, adjudged and decreed that the said Bill of Complaint herein be and the same is hereby dismissed.

HOYT H. WHEELER.

(Endorsed):—U. S. Circuit Court, Southern District of New York.—United States vs. The Joint 656
Traffic Association and ors.—Decree and Notice of Settlement.—Wallace Macfarlane, United States Attorney, Attorney for Plaintiff.—U. S. Circuit Court, Filed June 12, 1896.—John A. Shields, Clerk.

657

658 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Appellants,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE BALTI-
659 MORE & OHIO SOUTHWESTERN RAILWAY COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENN-
660 SYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY; THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY; THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY.

Respondents.

Assignment of Errors.

And now, on the 8th day of July, 1896, come the United States of America by Wallace Macfarlane,

their Attorney for the Southern District of New 661
York, and say that the decree in the above entitled cause is erroneous and against the rights of the plaintiffs, for the following reasons:

First. In that the said Circuit Court ordered, adjudged and decreed that the bill of complaint herein be dismissed.

Second. In that it did not order, adjudge and decree that the contract between the defendants set forth in the bill of complaint was unlawful, null and void, and that the defendants and each and every of them, and their officers, agents and servants, and each and every of them, should be enjoined perpetually from continuing in the com- 662
bination or association established by the said agreement and from acting or in any way operating their roads thereunder.

Third. In that the said Circuit Court did not decide and hold that the said contract between the defendants set forth in the complaint, entitled "Articles of Organization of the Joint Traffic Association," was a contract, agreement and combination between common carriers (subject to the provisions of the Act of February 4, 1887, entitled "An Act to regulate commerce") and was in whole or in part an unlawful contract, agreement and combination between such carriers for the pooling of freights of different and competing railroads. 663

Fourth. In that the said Circuit Court did not decide and hold that the said contract between the defendants set forth in the complaint, entitled "Articles of Organization of the Joint Traffic Association," was a contract, agreement and combination between common carriers, subject to the provisions of the Act of February 4, 1887, entitled "An Act to regulate commerce," and was in whole or in part an unlawful contract, agreement and combination between such carriers to divide between them the aggregate or net proceeds of the earnings of such railroads or some portion thereof.

664 *Fifth.* In that the said Circuit Court did not decide and hold that the defendants by executing the contract set forth in the bill of complaint, to wit, the Articles of Organization of the Joint Traffic Association, had entered into an unlawful contract, agreement and combination for the pooling of freights of different and competing railroads.

Sixth. In that the said Circuit Court did not decide and hold that the defendants by executing the contract set forth in the bill of complaint, to wit, the Articles of Organization of the Joint Traffic Association, had entered into an unlawful contract, agreement and combination to divide between them the aggregate or net proceeds of the earnings of
665 such railroads or some portion thereof.

Seventh. In that the said Circuit Court did not decide and hold that Article XIII. of said contract, to wit, Articles of Organization of the Joint Traffic Association, read with other provisions of said contract constituted a contract, agreement and combination for the pooling of freights of different and competing carriers, subject to the provisions of the Act of February 4th, 1887, entitled "An Act to regulate Commerce," in violation of Section 5 of said Act.

Eighth. In that the said Circuit Court did not decide and hold that violation of Section 5 of the
666 Act of February 4, 1887, entitled "An Act to regulate Commerce," are restrainable in equity at the suit of the United States.

Ninth. In that the said Circuit Court did not decide and hold that the contract set forth in the bill of complaint, to wit, the Articles of Organization of the Joint Traffic Association, was in whole or in part an unlawful contract and combination in restraint of trade and commerce among the several States and with foreign nations.

Tenth. In that the said Circuit Court did not decide that the said contract, to wit, the Articles of

Organization of the Joint Traffic Association, was 667
in whole or in part an unlawful conspiracy in restraint of trade and commerce among the several States and with foreign nations.

Eleventh. In that the said Circuit Court did not decide that the said contract, to wit, the Articles of Organization of the Joint Traffic Association, was an attempt on the part of the parties thereto, to wit, the defendants herein, to monopolize some part of the trade and commerce among the several States and with foreign nations.

Twelfth. In that the said Circuit Court did not decide that the said contract, to wit, the Articles of Organization of the Joint Traffic Association, was 668
a combination and conspiracy on the part of the defendants, parties to said contract, to monopolize a part of the trade and commerce among the several States and with foreign nations.

Thirteenth. In that the said Circuit Court did not decide and hold that the said contract, to wit, the Articles of Organization of the Joint Traffic Association, was in whole or in part an unlawful obstruction to and interference with interstate commerce, restrainable in equity at the suit of the United States.

Fourteenth. In that the said Circuit Court did not decide and hold that the said bill of complaint was in all respects maintained and did not grant 669
the relief therein prayed for.

WALLACE MACFARLANE,
U. S. Attorney
for the Southern District of New York,
On behalf of the United States,
Appellants.

(Endorsed):—U. S. Circuit Court of Appeals for the Second Circuit.—The United States of America, Appellants, vs. The Joint Traffic Association et al., Respondents.—Assignment of Errors.—U. S. Circuit Court, Filed July 8th, 1896.—John A. Shields, Clerk.

670 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

THE UNITED STATES OF AMERICA,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE
671 & OHIO RAILROAD COMPANY, THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENN-
672 SYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY; THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY.

Take notice, that the United States of America 673
hereby appeal to the U. S. Circuit Court of Appeals for the Second Circuit, from the decree of this Court entered in the above entitled suit on the 12th day of June, 1896, wherein and whereby it was ordered, adjudged and decreed that the bill of complaint herein be dismissed, and from each and every part of said decree.

Dated, New York, July 7th, 1896.

WALLACE MACFARLANE,
U. S. Attorney
for the Southern District of New York.

To JOHN A. SHIELDS, Esq., 674
Clerk.

(Endorsed):—U. S. Circuit Court of Appeals for the Second Circuit.—The United States of America vs. The Joint Traffic Association and others.—Notice of Appeal.—Wallace Macfarlane, United States Attorney, Attorney for United States.—U. S. Circuit Court, Filed July 22, 1896.—John A. Shields, Clerk.

675

676 UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Appellants,

against

THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE WEST SHORE RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE ALLEGHENY VALLEY RAILWAY COMPANY; THE BALTIMORE
677 & OHIO RAILROAD COMPANY; THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CHICAGO & ERIE RAILROAD COMPANY; THE CHICAGO & GRAND TRUNK RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY; THE GRAND RAPIDS & INDIANA RAILROAD COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE NORTHERN CENTRAL RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENN-
678 SYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY; THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY; THE PITTSBURG & LAKE ERIE RAILROAD COMPANY; THE PITTSBURG & WESTERN RAILWAY COMPANY; THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY; THE TOLEDO, PEORIA & WESTERN RAILWAY COMPANY; THE WABASH RAILROAD COMPANY,

Respondents.

The United States of America, complainants in the above-entitled suit, by Wallace Macfarlane,

their Attorney for the Southern District of New 679
York, acting in this behalf under the instructions of the Attorney-General of the United States, hereby apply for the allowance of an appeal to the U. S. Circuit Court of Appeals for the Second Circuit, from the decree of the Circuit Court of the United States for the Southern District of New York, entered herein on the 12th day of June, 1896, wherein and whereby it was ordered, adjudged and decreed that the bill of complaint herein be dismissed; and pray that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated, New York, July 7th, 1896. 680

WALLACE MACFARLANE,
U. S. Attorney
for the Southern District of New York.

And now, to wit, on July 8th, 1896, it is ordered that the foregoing application be granted and the appeal allowed as prayed for.

Dated, New York, July 8th, 1896.

(Sgd.) E. H. LACOMBE,
Judge of the U. S. Circuit Court of
Appeals for the Second Circuit.

681

(Endorsed):—U. S. Circuit Court of Appeals for the Second Circuit.—The United States of America, Appellants, vs. The Joint Traffic Association and others, Respondents.—Application for and Allowance of Appeal.—Wallace Macfarlane, United States Attorney, Attorney for United States.—U. S. Circuit Court, Filed July 22, 1896.—John A. Shields, Clerk.

682 THE UNITED STATES OF AMERICA, *ss.*

To the Joint Traffic Association, the New York Central & Hudson River Railroad Company, the West Shore Railroad Company, the New York, Ontario & Western Railway Company, the Erie Railroad Company, the Allegheny Valley Railway Company, the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railway Company, the Central Railroad Company of New Jersey, the Chesapeake & Ohio Railway Company, the Chicago & Erie Railroad Company, the Chicago & Grand Trunk Railway Company, the Cleve-
683 land, Cincinnati, Chicago & St. Louis Railway Company, the Delaware, Lackawanna & Western Railroad Company, the Detroit, Grand Haven & Milwaukee Railway Company, the Grand Rapids & Indiana Railroad Company, the Grand Trunk Railway Company of Canada, the Lake Shore & Michigan Southern Railway Company, the Lehigh Valley Railroad Company, the Michigan Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Philadelphia & Reading Railroad Company, the Philadel-
684 phia, Wilmington & Baltimore Railroad Company, the Pittsburg & Lake Erie Railroad Company, the Pittsburg & Western Railway Company, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, the Terre Haute & Indianapolis Railroad Company, the Toledo, Peoria and Western Railway Company, the Wabash Railroad Company.

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, on the 4th day of August, 1896, pursuant to

an appeal on the part of the United States, filed in 685
the Clerk's office of the Circuit Court of the United States for the Southern District of New York, in a certain suit or proceeding entitled "The United States of America, Appellants, vs. The Joint Traffic Association, the New York Central & Hudson River Railroad Company, the West Shore Railroad Company, the New York, Ontario & Western Railway Company, the Erie Railroad Company, the Allegheny Valley Railway Company, the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railway Company, the Central Railroad Company of New Jersey, the Chesapeake & Ohio Railway Company, the Chicago & Erie Railroad Company, the Chicago & Grand Trunk Rail- 686
way Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Delaware, Lackawanna & Western Railroad Company, the Detroit, Grand Haven & Milwaukee Railway Company, the Grand Rapids & Indiana Railroad Company, the Grand Trunk Railway Company of Canada, the Lake Shore & Michigan Southern Railway Company, the Lehigh Valley Railroad Company, the Michigan Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Philadelphia & Reading Railroad Company, the Philadelphia, Wilmington & Baltimore 687
Railroad Company, the Pittsburg & Lake Erie Railroad Company, the Pittsburg & Western Railway Company, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, the Terre Haute & Indianapolis Railroad Company, the Toledo, Peoria & Western Railway Company, the Wabash Railroad Company, " to show cause, if any there be, why the decision of the U. S. Circuit Court, in the said appeal mentioned, should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

688 Given under my hand at the City of New York, in the Southern District of New York, on the 8th day of July, 1896.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court
of Appeals for the Second Circuit.

WALLACE MACFARLANE,
U. S. Attorney,
On behalf of the United States,
Appellants.

689 (Endorsed):—U. S. Circuit Court of Appeals for the Second Circuit.—The United States of America, Appellants, vs. The Joint Traffic Association and others, Respondents.—Citation.—Wallace Macfarlane, United States Attorney, Attorney for United States.—U. S. Circuit Court, Filed July 22, 1896.—John A. Shields, Clerk.

690

UNITED STATES OF AMERICA,
Southern District of New York. } *ss.* 691

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify, that the foregoing pages, numbered from one (1) to two hundred and forty (240) inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of The United States of America, Complainant and Appellant, against The Joint Traffic Association, the New York Central & Hudson River Railroad Company, the West Shore Railroad Company, the New York, Ontario & Western Railway 692
Company, the Erie Railroad Company, the Allegheny Valley Railway Company, the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railway Company, the Central Railroad Company of New Jersey, the Chesapeake & Ohio Railway Company, the Chicago & Erie Railroad Company, the Chicago & Grand Trunk Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Delaware, Lackawanna & Western Railroad Company, the Detroit, Grand Haven & Milwaukee Railway Company, the Grand Rapids & Indiana Railroad Company, the Grand Trunk Railway Company of Canada, the Lake Shore & Michigan Southern Railway Company, the Lehigh Valley Railroad Com- 693
pany, the Michigan Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Philadelphia & Reading Railroad Company, the Philadelphia, Wilmington & Baltimore Railroad Company, the Pittsburg & Lake Erie Railroad Company, the Pittsburg & Western Railway Company, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, the Terre Haute & Indianapolis Railroad Company,

694 the Toledo, Peoria & Western Railway Company, the Wabash Railroad Company, Defendants and Appellees, as the same remain of record and on file in my office.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in
[SEAL.] the Second Circuit, this second day of October, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred
695 and twenty-first.

JOHN A. SHIELDS,
Clerk.

233 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court-rooms, in the city of New York, on the 19th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorables Wm. J. Wallace, E. Henry Lacombe, circuit judges.

THE UNITED STATES OF AMERICA
vs.
THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL AND Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario and Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake and Ohio Railway Company; The Chicago and Erie Railroad Company; The Chicago and Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Delaware, Lackawanna and Western Railroad Company; The Detroit, Grand Haven and Milwaukee Railway Company; The Grand Rapids and Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore and Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago, and St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia and Reading Railroad Company; The Philadelphia, Wilmington and Baltimore Railroad Company; The Pittsburg and Lake Erie Railroad Company; The Pittsburg and Western Railway Company; The Pittsburg, Cincinnati, Chicago and St. Louis Railway Company; The Terre Haute and Indianapolis Railroad Company; The Toledo, Peoria and Western Railroad Company; The Wabash Railroad Company.

The appeal from the decree of the circuit court of the United States for the southern district of New York, entered herein on the 12th day of June, 1896, having come on to be heard, and due deliberation having been had thereon:

234 Now, on motion of Carter & Ledyard, attorneys for the defendants, appellees, it is—

Ordered that the decree aforesaid be, and the same hereby is, in all things affirmed; and it is further—

Ordered that a mandate issue to the circuit court of the United States for the southern district of New York directing that court to proceed in accordance herewith.

E. H. L.

Assented to as to form.

CARTER & LEDYARD,
Att'ys for Def'ts The Joint Traffic Association.
WELLS H. BLODGETT AND
CLARENCE D. ASHLEY,
Att'ys for Wabash R. R. Co.
ROBINSON, BIDDLE & WARD,
Att'ys for Pennsylvania R. R. Co. *et al.*
HAMILTON ODELL,
Att'y for D., L. & Western R. R. Co.
STETSON, TRACY, JENNINGS & RUSSELL,
Att'ys for Chesapeake & Ohio R'y Co.; Cleveland, Cincinnati, Chicago & St. Louis R'y Co.; Erie R. R. Co.; Chicago & Erie R. R. Co.
DE FOREST BROS.,
Att'ys for Central R. R. of N. J.
FRANK LOOMIS,
Sol'r for Def't The N. Y. C. & H. R. R. Co.
ALEXANDER & GREEN,
Att'ys for Lehigh Valley R'y.
ASHBEL GREEN,
Att'y for West Shore R. R. Co.; N. Y., O. & W. R'y Co.; Michigan C. R. R. Co.; N. Y., C. & St. L. R. R. Co.; Grand Trunk R'y Co. of Canada; Chicago & G. T. R'y Co., & Detroit, G. H. & M. R'y Co.

235 GEO. C. GREENE,
Att'y for L. S. & M. S. R'y Co. & P. & L. E. R. R. Co.
HUGH L. BOND,
Att'y — the Baltimore and Ohio R. R. Co.; Baltimore & Ohio Southwestern R'y Co.; Pittsburgh & Western R'y Co.
WALLACE MACFARLANE, U. S. Att'y.

(Endorsed:) U. S. circuit court of appeals for the second circuit. United States *vs.* The Joint Traffic Association, etc. Order to issue mandate. Wallace Macfarlane, United States attorney, attorney for the United States. United States circuit court of appeals, second circuit. Filed Mar. 26, 1897. James C. Reed, clerk.

236 Supreme Court of the United States. In Equity.

THE UNITED STATES OF AMERICA, Appellants,
against
THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario & Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake & Ohio Railway Company; The Chicago & Erie Railroad Company; The Chicago & Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawan-a & Western Railroad Company; The Detroit, Grand Haven & Milwaukee Railway Company; The Grand Rapids & Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore & Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railroad Company; The Philadelphia, Wilmington & Baltimore Railroad Company; The Pittsburg & Lake Erie Railroad Company; The Pittsburg & Western Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Toledo, Peoria & Western Railway Company; The Wabash Railroad Company, Respondents.

Assignment of Errors.

And now, to wit, on the 26th day of March, 1897, come the United States of America, by Wallace Macfarlane, their attorney for the southern district of New York, and say that the order of the circuit court of appeals for the second circuit in the above-entitled cause is erroneous and against the rights of the plaintiffs for the following reasons:

237 First. In that the said circuit court of appeals ordered that the decree of the circuit court of the United States for the southern district of New York, entered herein on the 12th day of June, 1896, wherein it was adjudged and decreed that the bill of complaint herein should be dismissed, should be in all things affirmed.

Second. In that the said circuit court of appeals did not order and adjudge that the said decree of the circuit court of the United States

for the southern district of New York dismissing the bill of complaint herein should be in all things reversed.

Third. In that the said circuit court of appeals did not order, adjudge, and decree that the contract set forth in the bill of complaint herein, to wit, the "articles of organization of the Joint Traffic Association," was unlawful, null, and void, and that the defendants and each and every of them and their officers, agents, and servants and each and every of them should be enjoined perpetually from continuing in the combination or association established by the said agreement and from acting or in any way operating their roads thereunder.

Fourth. In that the said circuit court of appeals did not decide and hold that the contract set forth in the bill of complaint, to wit, the "articles of organization of the Joint Traffic Association," was an unlawful contract and combination in restraint of trade and commerce among the several States and with foreign nations.

238 Fifth. In that the said circuit court of appeals did not decide and hold that the said contract was an unlawful conspiracy in restraint of trade and commerce among the several States and with foreign nations.

Sixth. In that the said circuit court of appeals did not decide and hold that the said contract was an attempt on the part of the parties thereto, to wit, the defendants herein, to monopolize a part of the trade and commerce among the several States and with foreign nations.

Seventh. In that the said circuit court of appeals did not decide and hold that the said contract was a combination and conspiracy on the part of the defendants, parties to said contract, to monopolize a part of the trade and commerce among the several States and with foreign nations.

Eighth. In that the said circuit court of appeals did not decide and hold that the said contract, to wit, the "articles of organization of the Joint Traffic Association," was a contract, agreement, and combination between common carriers (subject to the provisions of the act of February 4, 1887, entitled "An act to regulate commerce") for the pooling of freights of different and competing railroads.

Ninth. In that the said circuit court of appeals did not decide and hold that the said contract, to wit, the "articles of organization of the Joint Traffic Association," was a contract, agreement, and combination between common carriers (subject to the provisions of the act of February 4, 1887, entitled "An act to regulate com-

239 merce") to divide between them the aggregate or net proceeds of the earnings of such railroads or some portion thereof.

Tenth. In that the said circuit court of appeals did not decide and hold that the defendants, by executing the contract set forth in the bill of complaint, to wit, the "articles of organization of the

Joint Traffic Association," had unlawfully entered into an unlawful contract, agreement, and combination for the pooling of freights of different and competing railroads.

Eleventh. In that the said circuit court of appeals did not decide and hold that the defendants, by executing the contract set forth in the bill of complaint, to wit, the "articles of organization of the Joint Traffic Association," had unlawfully entered into an unlawful contract, agreement, and combination to divide between them the aggregate or net proceeds of the earnings of such railroads or some portion thereof.

Twelfth. In that the said circuit court of appeals did not decide and hold that the contract set forth in the bill of complaint, to wit, the "articles of organization of the Joint Traffic Association," was a violation of the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that it was restrainable in equity at the suit of the United States, pursuant to the provisions of said act of July 2, 1890.

Thirteenth. In that the said circuit court of appeals did
240 not decide and hold that the contract set forth in the bill of complaint, to wit, the "articles of organization of the Joint Traffic Association," was a violation of section 5 of the act of February 4, 1887, entitled "An act to regulate commerce," and that being a violation of the section and act aforesaid was restrainable in equity at the suit of the United States.

Fourteenth. In that the said circuit court of appeals did not decide and hold that the said contract, to wit, the "articles of organization of the Joint Traffic Association," was an unlawful obstruction to and interference with the interstate commerce and restrainable in equity at the suit of the United States.

WALLACE MACFARLANE,
U. S. Attorney for the Southern District of New York.

(Endorsed:) U. S. Supreme Court. United States *versus* The Joint Traffic Association & others. Assignment of errors. Wallace Macfarlane, United States attorney, attorney for plaintiff. U. S. circuit court. Filed Mar. 26, 1897. John A. Shields, clerk.

241 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, Appellants,
against
THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario & Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake & Ohio Railway Company; The Chicago & Erie Railroad Company; The Chicago & Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; The Detroit, Grand Haven & Milwaukee Railway Company; The Grand Rapids & Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore & Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railroad Company; The Philadelphia, Wilmington & Baltimore Railroad Company; The Pittsburg & Lake Erie Railroad Company; The Pittsburg & Western Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Toledo, Peoria & Western Railway Company; The Wabash Railroad Company, Respondents.

Notice of Appeal.

Take notice that the United States of America hereby appeal to the Supreme Court of the United States from the final order, judgment, and decree of the United States circuit court of appeals for the second circuit, entered in the above-entitled suit on the 26th day of March, 1897, wherein and whereby it was ordered,
242 adjudged, and decreed that the decree of the circuit court of the United States for the southern district of New York dismissing the bill of complaint herein be affirmed, and from each and every part of said decree.

Dated New York, March 26th, 1897.

WALLACE MACFARLANE,
United States Attorney for the Southern District of New York.

To James C. Reed, clerk.

243 [Endorsed:] U. S. circuit court of appeals for the second circuit. The United States *vs.* The Joint Traffic Association & o'rs. Notice of appeal. Wallace Macfarlane, United States attorney, attorney for United States. United States circuit court of appeals, second circuit. Filed Mar. 27, 1897. James C. Reed, clerk.

Services of a copy of the within notice of appeal is hereby admitted.

Dated New York, March 26th, 1897.

HAMILTON ODELL,
Att'y for Delaware, Lackawanna & Western R. R. Co.

GEO. C. GREENE,
Att'y for Lake Shore & Michigan Southern R. R. Co. & Pittsburgh & Lake Erie R. R. Co.

ALEXANDER & GREEN,
Att'ys for Lehigh Valley R. R. Co.

ROBINSON, BIDDLE & WARD,
Att'ys for Pennsylvania R. R. Co.; Allegheny Valley R'y Co.; Northern Central R'y Co.; Pennsylvania Co.; Philadelphia, Wilmington & Baltimore R. R. Co.; Pittsburgh, Cincinnati, Chicago & St. Louis R'y Co.; Terre Haute & Indianapolis R. R. Co.; Toledo, Peoria & Western R'y Co.; Grand Rapids & Indiana R. R. Co.

DE FOREST BROTHERS,
Att'ys for Central R. R. Co. of New Jersey.

WELLS H. BLODGETT,
CLARENCE D. ASHLEY,
Att'ys for Wabash R. R. Co.

F. LOOMIS,
Sol'r for New York Central & Hudson River R. R. Co.

CARTER & LEDYARD,
Att'ys for the Joint Traffic Association.

STETSON, TRACY, JENNINGS & RUSSELL,
Att'ys for Chesapeake & Ohio R'y Co.; Cleveland, Cincinnati, Chicago & St. Louis R'y Co.; Erie R. R. Co.; Chicago & Erie R. R. Co.

ASBEL GREEN,
Att'y for West Shore R. R. Co.; New York, Ontario & Western R. R. Co.; Michigan Central R. R. Co.; New York, Chicago & St. Louis R. R. Co.; Grand Trunk R'y Co. of Canada; Chicago & Grand Trunk R'y Co.; Detroit, Grand Haven & Milwaukee R'y Co.

E. J. D. CROSS &
HUGH L. BOND, JR.,
Att'ys for Baltimore & Ohio R. R. Co.; Baltimore & Ohio Southwestern R'y Co.; Pittsburgh & Western R'y Co.

244 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, Appellants,
against
THE JOINT TRAFFIC ASSOCIATION; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; The West Shore Railroad Company; The New York, Ontario & Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake & Ohio Railway Company; The Chicago & Erie Railroad Company; The Chicago & Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; The Detroit, Grand Haven & Milwaukee Railway Company; The Grand Rapids & Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore & Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railroad Company; The Philadelphia, Wilmington & Baltimore Railroad Company; The Pittsburg & Lake Erie Railroad Company; The Pittsburg & Western Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Toledo, Peoria & Western Railway Company; The Wabash Railroad Company, Respondents.

Application for and Allowance of an Appeal.

The United States of America, the complainants in the above-entitled suit, by Wallace Macfarlane, their attorney for the southern district of New York, acting in this behalf under the instructions of the Attorney General of the United States, hereby apply for the allowance of an appeal to the Supreme Court of the United States from the final order, judgment, and decree of the United
245 States circuit court of appeals for the second circuit, entered herein on the 26th day of March, 1897, wherein and whereby it was ordered, adjudged, and decreed that the decree of the United States circuit court for the southern district of New York dismissing the bill of complaint herein be affirmed, and pray that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated New York, March 26th, 1897.

WALLACE MACFARLANE,
United States Attorney for the Southern District of New York.

And now, to wit, on the 26th day of March, 1897, it is ordered that the foregoing application be granted and the appeal allowed as prayed for.

Dated New York, March 26th, 1897.

E. HENRY LACOMBE,
Judge of the United States Circuit Court and of the United States Circuit Court of Appeals for the Second Circuit.

246 [Endorsed:] "A." Suit No. —. U. S. circuit court of appeals for the second circuit. The United States *vs.* The Joint Traffic Association & o'rs. Application for and allowance of an appeal. Wallace Macfarlane, United States attorney, attorney for United States. United States circuit court of appeals, second circuit. Filed Mar. 27, 1897. James C. Reed, clerk.

Services of a copy of the within application for and allowance of an appeal admitted.

Dated New York, March 26th, 1897.

HAMILTON ODELL,
Att'y for Delaware, Lackawanna & Western R. R. Co.
GEO. C. GREENE,
Att'y for Lake Shore & Michigan Southern R. R. Co. & Pittsburgh & Lake Erie R. R. Co.
ALEXANDER & GREEN,
Att'ys for Lehigh Valley R. R. Co.
ROBINSON, BIDDLE & WARD,
Att'ys for Pennsylvania R. R. Co.; Allegheny Valley R'y Co.; Northern Central R'y Co.; Pennsylvania Co.; Philadelphia, Wilmington & Baltimore R. R. Co.; Pittsburgh, Cincinnati, Chicago & St. Louis R'y Co.; Terre Haute & Indianapolis R. R. Co.; Toledo, Peoria & Western R'y Co.; Grand Rapids & Indiana R. R. Co.
DE FOREST BROS.,
Att'ys for Central R. R. Co. of New Jersey.
WELLS H. BLODGETT AND
CLARENCE D. ASHLY,
Att'ys for Wabash R. R. Co.
F. LOOMIS,
Sol'r for New York Central & Hudson River R. R. Co.
CARTER & LEDYARD,
Att'ys for The Joint Traffic Association.
STETSON, TRACY, JENNINGS & RUSSELL,
Att'ys for Chesapeake & Ohio R'y Co.; Cleveland, Cincinnati, Chicago & St. Louis R'y Co.; Erie R. R. Co.; Chicago & Erie R. R. Co.

ASHBEL GREEN,
Att'y for West Shore R. R. Co.; New York, Ontario & Western R. R. Co.; Michigan Central R. R. Co.; New York, Chicago & St. Louis R. R. Co.; Grand Trunk R'y Co. of Canada; Chicago & Grand Trunk R'y Co.; Detroit, Grand Haven & Milwaukee R'y Co.
E. J. D. CROSS &
HUGH L. BOND, JR.,
Att'ys for Baltimore & Ohio R. R. Co.; Baltimore & Ohio Southwestern R'y Co.; Pittsburgh & Western R'y Co.

247 THE UNITED STATES OF AMERICA, *ss:*

To The Joint Traffic Association; The New York Central & Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario & Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake & Ohio Railway Company; The Chicago & Erie Railroad Company; The Chicago & Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; The Detroit, Grand Haven & Milwaukee Railway Company; The Grand Rapids & Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore & Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railroad Company; The Philadelphia, Wilmington & Baltimore Railroad Company; The Pittsburg & Lake Erie Railroad Company; The Pittsburg & Western Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Toledo, Peoria and Western Railway Company; The Wabash Railroad Company:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States on the 16th day of April, 1897, pursuant to an appeal on the part of the United States,
248 filed in the clerk's office of the United States circuit court of appeals for the second circuit, in a certain suit or proceeding entitled "The United States of America, appellants, *vs.* The Joint Traffic Association; The New York Central & Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario & Western Railway Company; The Erie Railroad

Company; The Allegheny Valley Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake & Ohio Railway Company; The Chicago & Erie Railroad Company; The Chicago & Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; The Detroit, Grand Haven & Wilwaukee Railway Company; The Grand Rapids & Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore & Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railroad Company; The Philadelphia, Wilmington & Baltimore Railroad Company; The Pittsburg & Lake Erie Railroad Company; The Pittsburg & Western Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Toledo, Peoria & Western Railway Company; The Wabash Railroad Company," to show cause, if any there be, why the decision of the said United States circuit court of appeals, in the said appeal mentioned, should not be reversed, modified, or corrected and speedy justice should not be done in that behalf.

249 Given under my hand, at the city of New York, in the southern district of New York, on the 26th day of March, 1897.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court and of the U. S. Circuit Court of Appeals for the Second Circuit.

WALLACE MACFARLANE,
U. S. Attorney, on Behalf of The United States of America, Appellants.

250 [Endorsed:] Suit No. —. U. S. circuit court of appeals for the second circuit. United States *vs.* The Joint Traffic Association and others. Citation. Wallace Macfarlane, United States attorney, attorney for United States. United States circuit court of appeals, second circuit. Filed Mar. 27, 1897. James C. Reed, clerk.

Service of a copy of the within citation is hereby admitted.

Dated New York, March 26, 1897.

HAMILTON ODELL,
Att'y for Delaware, Lackawanna & Western R. R. Co.
GEO. C. GREENE,
Att'y for Lake Shore & Michigan Southern R. R. Co. & Pittsburgh & Lake Erie R. R. Co.
ALEXANDER & GREEN,
Att'ys for Lehigh Valley R. R. Co.
ROBINSON, BIDDLE & WARD,
Att'ys for Pennsylvania R. R. Co.; Allegheny Valley R'y Co.; Northern Central R'y Co.; Pennsylvania Co.; Philadelphia, Wilmington & Baltimore R. R. Co.; Pittsburgh, Cincinnati, Chicago & St. Louis R'y Co.; Terre Haute & Indianapolis R. R. Co.; Toledo, Peoria & Western R'y Co.; Grand Rapids & Indiana R. R. Co.
DE FOREST BROTHERS,
Att'ys for Central R. R. Co. of New Jersey.
WELLS H. BLODGETT AND
CLARENCE D. ASHLEY,
Att'ys for Wabash R. R. Co.
F. LOOMIS,
Sol'r for New York Central & Hudson River R. R. Co.
CARTER & LEDYARD,
Att'ys for the Joint Traffic Association.
STETSON, TRACY, JENNINGS & RUSSELL,
Att'ys for Chesapeake & Ohio R'y Co.; Cleveland, Cincinnati, Chicago & St. Louis R'y Co.; Erie R. R. Co.; Chicago & Erie R. R. Co.
ASHBEL GREEN,
Att'y for West Shore R. R. Co.; New York, Ontario & Western R. R. Co.; Michigan Central R. R. Co.; New York, Chicago & St. Louis R. R. Co.; Grand Trunk R'y Co. of Canada; Chicago & Grand Trunk R'y Co.; Detroit, Grand Haven & Milwaukee R'y Co.
E. J. D. CROSS &
HUGH L. BOND, JR.,
Att'ys for Baltimore & Ohio R. R. Co.; Baltimore & Ohio Southwestern R'y Co.; Pittsburgh & Western R'y Co.

251 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 250, inclusive, contain a true and com-

plete transcript of the record and proceedings had in said court in the case of The United States of America, complainant, against The Joint Traffic Association; The New York Central & Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario & Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake & Ohio Railway Company; The Chicago & Erie Railroad Company; The Chicago & Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; The Detroit, Grand Haven & Milwaukee Railway Company; The Grand Rapids & Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore & Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia & Read-
252 ing Railroad Company; The Philadelphia, Wilmington & Baltimore Railroad Company; The Pittsburg & Lake Erie Railroad Company; The Pittsburg & Western Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Toledo, Peoria & Western Railway Company; The Wabash Railroad Company, defendants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-first.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

Endorsed on cover: Case No. 16,544. U. S. C. C. of appeals, second circuit. Term No., 765. The United States, appellant, *vs.* The Joint Traffic Association *et al.* Filed March 30, 1897.

No. [illegible] Stat. 84.

Motion to dispense.

Filed Apr. 1, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

Office Supreme Court, U. S.
D.
APR 1 1887
JAMES H. [illegible], CLERK

THE UNITED STATES OF AMERICA,

THE ATLANTIC TRANSPORTATION COMPANY, THE NEW YORK, ONTARIO AND WESTERN RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE NEW YORK, PENNSYLVANIA AND OHIO RAILROAD COMPANY, THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY, THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, THE PITTSBURGH, CINCINNATI AND CHICAGO RAILWAY COMPANY, THE CHICAGO AND ATLANTIC RAILWAY COMPANY, THE CHICAGO AND ERIE RAILWAY COMPANY, THE CHICAGO AND ST. LOUIS RAILWAY COMPANY, THE DETROIT, EEL RIVER AND ILLINOIS RAILROAD COMPANY, THE LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DETROIT, EEL RIVER AND CHICAGO RAILWAY COMPANY, THE LAKE ERIE AND WESTERN

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES OF AMERICA
v.
THE JOINT TRAFFIC ASSOCIATION; THE NEW York Central and Hudson River Railroad Company; The West Shore Railroad Company; The New York, Ontario and Western Railway Company; The Erie Railroad Company; The Allegheny Valley Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Southwestern Railway Company; The Central Railroad Company of New Jersey; The Chesapeake and Ohio Railway Company; The Chicago and Erie Railroad Company; The Chicago and Grand Trunk Railway Company; The Cleveland, Cincinnati, Chicago and St Louis Railway Company; The Delaware, Lackawanna and Western Railroad Company; The Detroit, Grand Haven and Milwaukee Railway Company; The Grand Rapids and Indiana Railroad Company; The Grand Trunk Railway Company of Canada; The Lake Shore and Michigan Southern Railway Company; The Lehigh Valley Railroad Company; The Michigan Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Northern Central Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; The Philadelphia and Reading Railroad Company; The Philadelphia, Wilmington and Baltimore Railroad Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburg and Western Railway Company; The Pittsburg, Cincinnati, Chicago and St. Louis Railway Company; The Terre Haute and Indianapolis Railroad Company; The Toledo, Peoria and Western Railway Company; The Wabash Railroad Company. } No.

MOTION TO ADVANCE.

The defendant, The Joint Traffic Association, is an unincorporated association, composed of the other defend-

ants above named. It is claimed by the United States to violate, by its agreement of association, the first and second sections of the so-called Anti-Trust act of July 2, 1890, as well as the fifth section of the so-called interstate commerce act of February 4, 1887, and also to be an unlawful interference with interstate commerce irrespective of any statutory provision.

On December 26, 1895, the Interstate Commerce Commission requested the Attorney-General to direct the United States attorney for the southern district of New York to institute proceedings to prevent the carrying into effect of said agreement. Thereupon the Attorney-General directed said attorney to institute such proceedings, basing them upon all the positions above mentioned. Such bill having been filed, the cause was heard upon bill and answer, and dismissed by Judge Wheeler in the United States circuit court (76 Fed. Rep., 895). An appeal from this decree was heard by Judges Wallace and Lacombe, in the circuit court of appeals for the second circuit, who affirmed the decision, upon an argument and without opinion, on March 19, 1897. An appeal from this decree of affirmance has been duly taken and the cause docketed.

The agreement is believed to be illegal within the principle of *United States* v. *Trans-Missouri Freight Association*, decided by this court March 22, 1897; but I am informed that this is contested by the defendants, or by some of them, and that they will continue to operate under their agreement until the decision of this court in the premises.

The cause being one of great public importance, involving the right of competing railroad companies to combine for the purpose of maintaining rates and pooling traffic, I respectfully move this court for an advancement of the cause, to be heard at the present term.

HOLMES CONRAD,
Solicitor-General.

FILED.
FEB 19 1898
JAMES H. McKENNEY
CLERK

No. 341 & 342.

Brief of Atty. Gen.l (Richards) for Appellant.

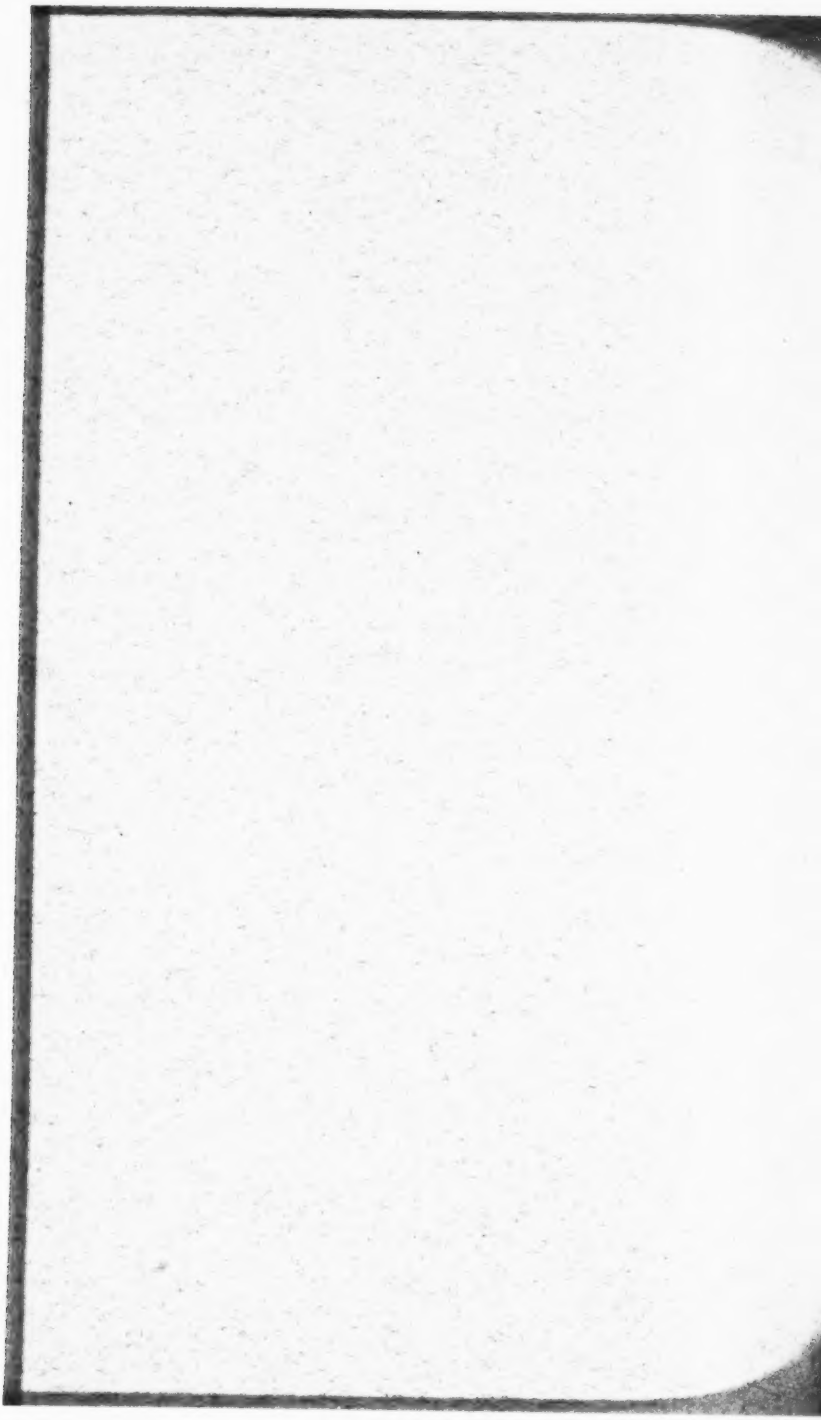
Filed Feb. 19, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1896–97.

THE UNITED STATES, APPELLANT,
v.
THE JOINT TRAFFIC ASSOCIATION et al., appellees. } No. 341.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1896–97.

THE UNITED STATES, APPELLANT,
v.
THE JOINT TRAFFIC ASSOCIATION et al., appellees.
No. 341.

BRIEF FOR THE UNITED STATES.

STATEMENT.

THE AGREEMENT.

On November 19, 1895, thirty-one railroad companies, appellees herein, entered into an agreement, to take effect January 1, 1896, by which they constituted themselves an association to be known as The Joint Traffic Association (Rec., pp. 15–38).

The purposes of the agreement, as stated in the preamble (Rec., p. 17), were—

> To aid in fulfilling the purposes of the interstate-commerce act, to cooperate with each other and adjacent transportation associations, *to establish and*

maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economy in the conduct of the freight and passenger service.

Article I (Rec., p. 19) provides that—

The affairs of The Association shall be administered by

A Board of Control;

A Board of Managers, called The Managers;

A Board of Arbitration, called The Arbitrators;

and that the term "traffic" wherever used shall cover both freight and passenger traffic.

Article II (Rec., p. 19) defines the traffic "*subject to The Association*" as follows:

> SECTION 1. *The Association shall have jurisdiction over all competitive traffic* (subject to the exceptions noted in section 2 of this article) which passes to, from, or through the western termini of the trunk lines, viz: Toronto, Canada; Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk, and Salamanca, N. Y.; Erie, Pittsburg, and Allegheny, Pa.; Bellaire, Ohio; Wheeling, Parkersburg, Charleston, and Kenova, W. Va., and Ashland, Ky., and such other points as may hereafter be designated by The Managers as such termini; also all traffic which may pass through other junctions of the companies parties hereto which is included in passing through any of the termini or junctions above or hereafter specified, and such other traffic as may by common consent of the parties be hereafter included herein.
>
> SEC. 2. The following shall not be included:
>
> (*a*) Coal, coke, iron ore, mill cinder, limestone, and petroleum, crude or refined.

(*b*) Traffic destined to or coming from Florida, Georgia, North and South Carolina, Virginia, and West Virginia south of the south line of the Chesapeake and Ohio Railway.

Article III (Rec., p. 20) creates *the Board of Control* and defines its powers. *It is composed of the presidents* of the companies forming The Association. It fixes the salaries of any commissioners appointed by The Managers, and the salaries of other officers and employees of The Association shall be subject to its review and approval. *It selects The Arbitrators* and fixes their compensation and term of service. It appoints an auditing committee to examine and report upon the accounts of The Association. It prescribes the conditions under which additional railways may become parties to The Association. *It alone considers appeals* from the action of The Managers on all questions *as to rates or fares*, except differentials, but pending *decisions by the Board of Control the decisions and orders by The Managers shall prevail.*

Article IV (Rec., p. 22) provides for *the Board of Managers*, consisting of one member from each of nine trunk-line systems, which are defined, namely: The Baltimore and Ohio, the Chesapeake and Ohio, the Erie, the Grand Trunk, the Lackawanna, the Lehigh Valley, the Pennsylvania, the Vanderbilt, and the Wabash.

Article V (Rec., p. 25) provides that The Managers shall have their principal office in New York City, shall elect a chairman, shall adopt their rules and perfect their organization, and then provides:

SEC. 4. *The Managers shall construe this agreement and all resolutions.*

SEC. 5. *All applications for differentials and for*

CHANGES *in rates, fares, charges, and rules shall be made to The Managers.* Their action upon differentials and upon all questions except as to rates and fares shall be subject to appeal, but only to The Arbitrators. *Their action as to rates and fares* (except differentials) *shall be subject to appeal only to the Board of Control. Decisions and orders of The Managers shall be complied with until such appeals are decided.*

Articles VII (Rec., p. 27) and VIII (Rec., p. 29), relating to rates, fares, charges, and rules, read as follows:

ARTICLE SEVEN.—RATES, FARES, CHARGES, AND RULES.

SECTION 1. The duly published schedules of rates, fares, and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), *are hereby reaffirmed* by the companies composing The Association, and the companies, parties hereto, shall, within ten days after this agreement becomes effective, file with The Managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto.

SEC. 2. *The Managers shall, from time to time, recommend such changes in said rates, fares, charges, and rules as may be reasonable and just and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto, as and when made, shall be deemed a violation of this agreement. No company, party hereto, shall,* through any of its officers

or agents, *deviate from or change the rates, fares, charges*, or rules herein reaffirmed or *so recommended by The Managers*, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company, party hereto, authorizing any such change shall be immediately forwarded by the company making the same to The Managers, and such change shall not become effective until thirty days after the receipt of such resolution by The Managers. *The Managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.*

SEC. 3. The powers conferred upon The Managers shall be so construed and exercised as not to permit violation of the interstate commerce act, or any other law applicable to the premises, or any provision of the charters, or the laws applicable to any of the companies parties hereto, and The Managers shall cooperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder.

ARTICLE EIGHT—PROPORTIONS OF COMPETITIVE TRAFFIC.

The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done.

By Article IX (Rec., p. 29) it is provided that "The Managers shall decide and impose the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rate, fares,

charges, and rules established under this agreement. The interest of companies, parties hereto, injuriously affected by such action of The Managers, shall be accorded reasonable protection in so far as The Managers can legally do so." The Managers may determine the divisions of rates and fares between connecting companies, parties hereto, and between them and connections not parties hereto.

Article X (Rec., p. 30) recognizes that the limitation or termination of the powers of through commission freight lines is required.

Article XI (Rec., p. 31) authorizes The Managers to organize such joint freight and passenger agencies as they may deem advisable.

Article XII (Rec., p. 31) provides that no soliciting or contracting passenger or freight agency shall be maintained by any company in connection with the traffic covered by this agreement, except with the approval of The Managers, and no person objectionable to The Managers shall be employed or continued in such agency.

Article XIII (Rec., p. 32) directs The Managers to define the authority and duties of all contracting and soliciting freight and passenger agents, and empowers them to determine the number of such persons to be employed. Such agents as The Managers appoint shall be carried on the pay roll of The Association. The Grand Trunk Company may appoint soliciting agents in Canada to meet the competition of Canadian lines not parties hereto, but such persons shall be subject to the rules of The Managers.

Article XIV (Rec., p. 14) authorizes The Managers, on information or complaint, to investigate any matter

and require the attendance of the officials or employees of any company, and Article XV (Rec., p. 14) binds the companies to furnish to The Managers all reports, papers, and information relating to the traffic covered by the agreement which may be requested.

Articles XVI and XVII, defining the penalties and creating the expense fund, read as follows (Rec., pp. 33–35):

ARTICLE SIXTEEN—FORFEITURES FOR VIOLATIONS OF AGREEMENT.

For any action by any party hereto which in the judgment of The Managers constitutes a violation of this agreement the offending company shall forfeit to The Association a sum to be determined by The Managers, not exceeding five thousand dollars, but where the gross receipts of the transaction in which this agreement is violated shall exceed five thousand dollars the offending party shall, at the discretion of The Managers, forfeit a sum not exceeding such gross receipts. Such forfeitures shall be applied to the payment of the expenses of The Association, except that the offending company shall not participate in such application of its own forfeiture.

ARTICLE SEVENTEEN—DEPOSITS, EXPENSE FUND, AND PROVISION FOR FORFEITURES.

SECTION 1. Upon the call of The Managers after this agreement becomes effective, each company party hereto shall deposit with them the sum of five thousand dollars, and in addition thereto, upon their like call, such further sums monthly, based upon the gross earnings of each company party hereto from the traffic covered hereby, as The Managers

may decide to be necessary to defray the expenses of The Association, including the salaries of the commissioners and arbitrators, and to provide for such forfeitures as may be adjudged.

SEC. 2. Any forfeiture made by any company party hereto, under the rules, shall be taken from the sums contributed by such company and charged in whole to its account. If this deposit at the time, exclusive of its said original contribution of five thousand dollars, shall be insufficient, it shall pay to The Managers such deficiency within fifteen days after the forfeiture is finally adjudged.

SEC. 3. The balance of said deposits remaining at the expiration of this agreement shall be divided between the companies then parties hereto in the ratio in which they have contributed, less the amounts forfeited.

Article XVIII (Rec., p. 35) provides that any party retiring from the agreement, except by unanimous consent, shall not be entitled to any refund from the residue of deposits remaining at the close of the agreement.

Article XIX (Rec., p. 36) invests the Board of Arbitration, consisting of two persons, with jurisdiction to hear appeals on all questions except the determination of rates and fares, and makes its decision final.

Article XX (Rec., p. 37) provides that amendments to the agreement can only be made by the unanimous vote of the parties to it.

Article XXI (Rec., p. 37) provides that the agreement shall take effect January 1, 1896, and continue in existence for five years thereafter. After said period any company may retire therefrom upon giving ninety days' written notice of its desire to do so.

THE SUIT.

On January 7, 1896, the United States as complainant filed in the circuit court of the United States for the southern district of New York, through the United States attorney for that district, and under the direction of the Attorney-General, its bill of complaint against The Joint Traffic Association and the thirty-one railroad companies composing it, for the purpose of having the agreement set aside and declared null and void and of enjoining the defendants from operating under it.

THE BILL. (Rec. pp. 2–14.)

The bill, after averring the incorporation of the railway companies, alleges that at the time of making the agreement, and ever since, they were and are common carriers engaged in interstate commerce; that the nine trunk-line systems which they compose, on and prior to the making of the agreement, operated separate railroad lines or systems engaged in interstate and foreign commerce, and were in active competition with each other for such traffic, and "furnished to all persons engaged in such traffic or travel among the States and Territories of the United States separate and independent and competitive lines of transportation in respect to the traffic;" that the defendant railway companies, for certain unlawful purposes which are named, to wit (Rec. p. 6):

> To restrain trade and commerce among the several States;
>
> To restrain and prevent competition among the

said railroads in respect to all the interstate trade and commerce, hereafter more particularly described;

To deprive the public engaged in such interstate trade and transportation of the facilities and advantages which the said public had theretofore enjoyed from the independent competition of said railroads;

To establish and maintain rates of freight and passenger transportation fixed arbitrarily and uninfluenced by competition—

entered into "a certain unlawful contract, agreement, combination, and conspiracy to restrain trade and commerce among the several States," being the agreement already described, a copy of which is made a part of the bill.

An amendment to the bill, filed March 9, 1896 (Rec. p. 48), avers that, on or about December 26, 1895, the Interstate Commerce Commission notified the Attorney-General that it considered the agreement to be in conflict with the interstate commerce act, and requested him to direct the United States attorney to prevent its execution, whereupon the Attorney-General directed the United States attorney to institute the necessary proceeding to to have the agreement declared null and void, and the parties to it prevented from carrying it into effect, on the ground that it appeared to be in violation of the interstate commerce act and also in violation of the "anti-trust law," and on all other existing grounds.

THE ANSWERS.

The answers, which are alike in substance, admit the allegations of incorporation, admit the defendant railway companies are common carriers, and were and are en-

gaged in interstate and foreign commerce, and admit that at the time of making the agreement "the several railway companies constituting what are termed in said agreement, respectively, the Baltimore and Ohio, the Chesapeake and Ohio, the Erie, the Grand Trunk, the Lackawanna, the Lehigh Valley, the Pennsylvania, the Vanderbilt, and the Wabash systems, with their leased, controlled, or operated lines, *owned, operated, and controlled separate railway systems or lines engaged with their connections independently in commerce among the States and Territories of the United States and with foreign nations, and were in active competition with each other for such traffic, both in freight and passengers, and furnished to all persons engaged in such traffic or travel among the States and Territories of the United States separate and independent and competing lines of transportation in respect to the travel in said bill mentioned.* (*Par. 3, Rec., p. 64.*)

The execution of the agreement is admitted, but there is a denial of any unlawful intent, and an elaborate argument designed to show that the restraint upon trade and commerce imposed by the agreement is reasonable and necessary. The justification set forth may be briefly summarized as follows:

1. Prior to the interstate commerce act the growth of railroads had rendered certain joint action necessary to meet the needs of commerce.

2. To carry out the prohibitions of the interstate commerce act against unjust discriminations and undue preferences, concert of action among the railroads is absolutely necessary.

3. Unrestricted competition invites unjust and secret discrimination, and inevitably leads to those practices prohibited by the interstate commerce act, through which in the end the weaker roads will be forced into bankruptcy. Such competition is inconsistent with those uniform and stable rates and fares, just and reasonable to carrier and shipper, which it is the object of the commerce act to secure and maintain.

THE PROCEEDINGS BELOW.

The case was heard on bill and answer before the circuit court (Judge Wheeler), and the bill was dismissed. The Government appealed to the circuit court of appeals, which (Judges Lacombe and Wallace sitting) affirmed the judgment of the circuit court. A short opinion by Judge Wheeler is printed in the record, page 211. No opinion was delivered by the circuit court of appeals. The case comes here on the appeal of the Government from the decree of the circuit court of appeals.

Under the decision of this court in the Trans-Missouri Case, the averments of intent in the bill and the denials and counter averments in the answers, are immaterial. The question to be discussed is the meaning and effect of the agreement itself. The Government case rests upon the agreement, its legal effect and operation.

> Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself can not be altered by the answer, nor can its violation of law be made valid by allegations of good intention

or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? (*United States* v. *Freight Association*, 166 U. S., 290, 341.)

ARGUMENT.

I.

The agreement violates the anti-trust law, because it creates an association of competing trunk line systems, to which is given jurisdiction over competitive interstate traffic, with power, through a central authority, aided by a skillful scheme of restrictions, regulations, and penalties, to establish and maintain rates and fares on such traffic and prevent competition, thus constituting a contract in restraint of trade or commerce among the several States, as defined by this court in the Trans-Missouri Case (166 U. S., 290).

The act of July 2, 1890 (26 Stats., 209), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," provides:

> SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> SEC. 2. Every person who shall monopolize, or

attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, etc.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition, setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

In the Trans-Missouri Case this court held:

1. That the anti-trust law applies to common carriers by railroad. (166 U. S., bottom p. 326.)

2. That it prohibits and renders illegal *all* agreements in restraint of interstate trade and commerce, whether the restraint be reasonable or unreasonable. (166 U. S., 327, 341.)

The question, then, is whether the agreement under consideration operates as a restraint upon interstate trade and commerce. The prohibition of the anti-trust act, as construed by this court, applies to all contracts in restraint of trade or commerce, and is not confined to those in unreasonable restraint.

For convenience of reference I have printed in parallel columns, as an appendix to this brief, the agreement creating the Trans-Missouri Freight Association and that creating the Joint Traffic Association. A comparison of these two agreements will convince the court, not only that the Joint Traffic agreement operates to restrain trade and commerce by preventing competition in the same illegal way the Trans-Missouri did, but that it contains many additional illegal and objectionable provisions, inserted for the purpose of more effectually restraining competition and maintaining rates and fares.

The Trans-Missouri agreement declares that it is formed, among other things, "for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." (Preamble, 166 U. S., 292.)

The Joint Traffic agreement was entered into, among other purposes, "to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic." (Preamble, Rec., p. 17.)

The Trans-Missouri agreement included "all traffic competitive between any two or more members hereof," passing between certain points. (Art. I, 166 U. S., 293.)

The Joint Traffic agreement vests The Association with

"jurisdiction over all competitive traffic" (both freight and passenger) passing between certain termini. (Article 2, Rec., p. 19.)

The Trans-Missouri agreement provides (art. 2, sec. 1) for the election of a chairman; (art. 2, sec. 2) that "each road shall designate to the chairman a person who shall be held personally responsible for rates on that road" (art. 2, sec. 3); for the appointment of a committee "to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines." From the conclusions of this committee, when divided in opinion, an appeal is provided to the managers of the lines, and if they disagree, the matter is to be arbitrated. (166 U. S. 294.)

The Joint Traffic agreement provides that the rates and fares in force shall control, subject to the authority of The Managers to change them from time to time and establish new rates and fares. (Art. 7, Rec., p. 28.) From the action of The Managers on rates and fares an appeal lies to the Board of Control, but pending the decision by this board the order of The Managers shall prevail. (Art. 3, sec. 7, Rec., p. 22.) The authority to change rates and fares and establish new ones is purposely conferred in covert language, thus:

> The Managers shall from time to time *recommend* such changes in said rates, fares, charges, and rules as shall be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein. (Art. 7, sec. 2, Rec., p. 28.)

While the agreement says "recommend," it means "make." The so-called "recommendation" of The Managers is not required to be submitted to any person or company. No action on the part of anybody else is required to give force or effect to the "recommendations" of The Managers. The word "recommend" is used to disguise the power conferred, and afford ground for the argument (used here) that The Managers have no power to change rates; nevertheless, the "recommendation" operates as the actual changing of rates and the fixing of new rates. The failure of any company to observe the "recommendations," that is, abide by the new rates established by The Managers, operates as a violation of the agreement. Following the power conferred on The Managers to "recommend" changes in rates when necessary "for protecting the interests of the parties" to the agreement, comes this language:

> And the failure to observe such recommendations by any party hereto *as and when made* shall be deemed a violation of this agreement. No company party hereto shall, through any of its officers or agents, deviate from the rates, fares, charges, or rules here reaffirmed [this refers to the existing schedules adopted by the agreement], *or so recommended* [that is, fixed] by The Managers, except by resolution of its Board.

In this connection let the court consult other provisions of the agreement. Article V relates to the duties and powers of The Managers. Section 5 (Rec., p. 26) of this article provides—

> All applications for differentials and for changes in rates, fares, charges, and rules shall be made to

> The Managers. * * * Their action as to rates and fares (except differentials) shall be subject to appeal only to the Board of Control. Decisions and orders of The Managers shall be complied with until such appeals are decided.

What does this mean except that The Managers may change rates, subject to an appeal only to the Board of Control, composed of the presidents of the companies? The application "for changes in rates" must be made to the body authorized to change rates, namely, The Managers. The Managers do not recommend action upon such applications, *but act*, and "their action as to rates and fares shall be subject, to appeal *only* to the Board of Control." There is no provision for an appeal to the Boards of Directors of the different companies. The competitive traffic is made subject to The Association. The Association is formed to establish and maintain the rates; The Association in doing this acts through The Managers, with an appeal *only* to the Board of Control.

The Trans-Missouri agreement (art. 2, sec. 6, 166 U. S., 295) allows each member, at its peril, to make, without notice, such rate as may be necessary to meet the competition of outside lines. Such action must be reported to The Association, and if it shall decide the rate was not made in good faith, the member becomes subject to the penalty provided in the agreement.

The Joint Traffic agreement offers no such discretion to its members. No deviation from the rates adopted by the agreement or changed by The Managers can be made, except by resolution of the Board of Directors.

which must be forwarded to The Managers, and the change shall not become effective until thirty days after the receipt of such resolution by The Managers. The agreement then proceeds in this significant language (art. 7, sec. 2, Rec., bottom p. 28):

> The Managers, upon receiving such notice, shall act promptly upon the same, for the protection of the parties hereto.

Thus The Managers are enjoined to take immediate steps to discipline the company which violates the agreement by deviation from the rates established by The Association.

The Trans-Missouri agreement provides for a fine not exceeding $100 for each violation, the chairman to investigate and report violations to The Managers, who are to assess the penalties. (Art. 2, sec. 8, 166 U. S., 296.)

The Joint Traffic agreement provides a penalty, to be determined by The Managers, "not exceeding $5,000," but where the gross receipts of the transaction in which the agreement is violated shall exceed $5,000, the offending party shall, at the discretion of The Managers, forfeit a sum not exceeding such gross receipts." (Art. 16, Rec., p. 33.) The payment of the penalties or forfeitures is secured by deposits in advance. (Art. 17, Rec., p. 34.)

The combination of competing lines in one association for the purpose of establishing and maintaining rates, the selection of a central authority representing the competing lines authorized to fix and change rates, the liability of the members of The Association to penalties for deviations from the rates thus fixed, are provided for in each agreement. Each agreement operates as a restraint upon

commerce, because each limits and restricts competition. With respect to rates on traffic, there is a virtual consolidation of competing lines under each agreement. The rate is not fixed by the individual company or system, but by the committee or managers representing The Association of competing lines and systems. The companies abdicate, The Association dominates. So long as the companies stand by the agreement and observe its provisions, there can be no competition as to rates. Each association is by express terms given jurisdiction over the competitive traffic of the lines composing it. For what purpose? To control the traffic; to establish and maintain the rates. To do this is to prevent competition and thus restrain trade and commerce.

In the Trans-Missouri Case, Mr. Justice Peckham, speaking for this court, said (bottom p. 341):

> Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." To that end The Association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act.

This language is used with respect to the Trans-Missouri agreement, but every word of it applies equally well to the joint traffic agreement. In each case an association is formed to establish and maintain rates on interstate traffic, a central authority is created to fix the rates, and a penalty provided for any company which deviates from the rates so fixed.

But as a contract in restraint of commerce, the Trans-Missouri agreement is crude and ineffective when compared with the Joint Traffic agreement. The Trans-Missouri provides a penalty for competition. The Joint Traffic goes further, and contains provisions designed to deprive companies of the means of competing, while removing the inducement to compete. Control of the soliciting and contracting freight and passenger agencies is placed in The Managers, who are authorized to organize joint agencies. This done, supervision of the sources of securing business being thereby given The Managers, they are charged with the duty of apportioning the competitive traffic equitably among the members of The Association. Let me call the attention of the court to the provisions for carrying into effect this admirable plan to suppress competition by handing all the competitive traffic over to The Managers, authorizing them to fix the rates, supervise the soliciting agencies, and finally see to it that each company gets its equitable proportion of the traffic covered by the agreement.

> It is recognized and agreed that economy in the operation of through cooperative and commission freight lines and the limitation or termination of many of their existing powers and functions are absolutely required, and the companies parties hereto

will actively cooperate with The Managers and so manage such lines as to accomplish such results. (Art. 10, Rec., p. 30.)

The Managers shall have authority to organize such joint freight and passenger agencies as they may deem desirable, provided that if such joint agencies are established they shall be so arranged as will give proper representation to each company party hereto. (Art. 11, Rec., p. 31.)

No soliciting or contracting passenger or freight agency shall be maintained, directly or indirectly, by any of the companies parties hereto, or by any freight line in connection with the traffic covered by this agreement, *except with the approval of The Managers;* and no person who is decided by The Managers to be objectionable shall be employed or continued in such agency. (Art 12, Rec., p. 31.)

SEC. 1. The Managers shall define the authority and duties of all persons acting as contracting and soliciting freight and passenger agents in relation to the traffic covered hereby, and, with due regard to the relative interests involved, they may determine the number of such persons to be employed. The parties hereto shall observe and enforce the orders of The Managers from time to time issued in that behalf.

SEC. 2. Such contracting and soliciting agents as The Managers appoint shall be carried upon the pay rolls of The Association.

SEC. 3. The Grand Trunk Company may appoint soliciting agents to be located at such points in Canada as may be necessary to meet competition of Canadian lines not parties hereto, but such persons shall in all respects be subject to the rules of The Managers (art. 13, Rec., p. 32).

By the fourteenth article (Rec., p. 33) The Managers are authorized, on information or complaint, to investi-

gate any matter, and require the attendance of the officials or employees; and in the fifteenth the companies bind themselves to furnish The Managers, when requested, all reports, papers, and information relating to the traffic covered by the agreement (art. 15, Rec., p. 33).

The companies having thus surrendered to The Managers the agencies formerly used in competing for the business covered by the agreement, the following article was inserted in order to secure to each company its fair share of the competitive traffic handed over to The Association:

ARTICLE VIII. (Rec., p. 29.)

Proportions of competitive traffic.

> The Managers are charged with the duty of securing to each company, party hereto, equitable proportions of the competitive traffic covered by this agreement so far as can be legally done.

In the lower courts there was much discussion as to whether this power and duty to apportion the competitive traffic does or does not constitute "a pooling of freights" within the prohibition of the fifth section of the interstate commerce act, which provides:

> It shall be unlawful for any common carrier * * * to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof.

It is immaterial whether it does or does not. The provision is an auxiliary one, designed to strengthen the

agreement, but not essential to its existence or operation. It may be rejected without destroying the agreement. The contract in restraint of trade is the agreement creating The Association to establish and maintain rates on competitive traffic fixed arbitrarily and without competition. Article VIII offers a sort of guaranty to the members that each company will get its fair share of competitive business, whether it does or does not compete. Of course the purpose is to remove the inducement to compete. An agreement to apportion traffic operates much the same as one to divide earnings. Railroads which pool their earnings have no inducement to compete. All the individual company earns goes into the pool, and it only gets its share after all. So where the traffic or business is pooled, if a company, by competing, gets more than its share, it must yield the excess by permitting a diversion of traffic from its line to lines which are short. A strict account is kept of the traffic carried by each trunk line. If the traffic of a particular line exceeds its percentage, the line is deemed "over," and must account for the excess to the lines which are "short."

The pooling of freights and the division of earnings were prohibited by the anti-pooling provisions of the interstate commerce act, not because bad in themselves, but because they are used as means to an end, and this end is the suppression of competition and the maintenance of arbitrary rates. An agreement to pool freights and divide earnings removes the object of competition; the result is rates fixed independent of competition. In prohibiting pooling Congress did not make it a condi-

tion that the rates established and maintained under a pooling agreement should be unreasonable. It sufficed they would be arbitrary, uninfluenced by competition. The public would be placed at the mercy of the traffic managers.

So, too, in the case of a contract in restraint of trade, prohibited by the anti-trust law; it is enough if the agreement interferes with those natural laws which ordinarily determine rates; it is enough if it restricts competition; it is enough if it puts it in the power of the combined railroads arbitrarily to fix rates. We do not have to inquire whether the rates fixed are reasonable or unreasonable. It is the power through combination arbitrarily to fix rates which is prohibited.

The way in which the power conferred by the eighth article was used by The Managers to strengthen The Association and maintain the rates by diverting competitive traffic from one line to another, is shown in Senate Document No. 133, Fifty-fifth Congress, second session, containing testimony taken by the Interstate Commerce Commission in an investigation of The Joint Traffic Association, extracts from which are printed in Appendix B.

II.

I dare say counsel for the trunk lines will reargue, or attempt to reargue, the questions settled by this court in the Trans-Missouri Case. That case was elaborately argued and carefully considered. A petition for a rehearing was presented and denied. The decision has been accepted and acted upon by the departments of the Government, and by the courts, both State and Federal, as

definitively settling the meaning and scope of the anti-trust law when applied to traffic associations among competing interstate railway systems. [See Appendix C.] The decision was not only a just, but an eminently salutary one. I shall not concede that the principles it laid down remain questionable. I shall not admit that it is necessary for me, by argument, to fortify the position taken by this court in that case. The anti-trust law, as there construed is the law of the land.

The wisdom of Congress in prohibiting *all* agreements in restraint of trade among interstate railway systems is even more manifest now than when the Trans-Missouri Case was decided. At the time of the argument of the Trans-Missouri Case, it was still to some extent a mooted question whether the Interstate Commerce Commission was empowered to determine what are fair and reasonable rates, and to enforce such rates. This question is no longer open.

In the case of *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railroad Company* (167 U. S., 479), this court, speaking by Mr. Justice Brewer, distinctly held there is no power in the commission to prescribe rates (bottom p. 511):

> Our conclusion, then, is that Congress has not conferred upon the commission the legislative power of prescribing rates, either maximum, or minimum, or absolute. As it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the

> courts a peremptory order that in the future railroad companies should follow the rates thus determined to have been in the past reasonable and just.

In the subsequent case of *Interstate Commerce Commission* v. *Alabama Midland Railway* (168 U. S., 144) the court adhered to the conclusion that Congress has not given the commission the power to prescribe rates, and held that, under section 4 of the interstate commerce act, competition between rival routes is an element to be considered in determining whether a railroad company might charge more for a long than for a short haul, the court, by Mr. Justice Shiras, saying (p. 164):

> That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the circuit courts.

On page 173, after quoting an expression of the circuit court of appeals to the effect that carriers are better qualified to adjust rates than any court or public commission, to which counsel for the Interstate Commerce Commission had taken exception, this court said:

> We understand the statement made in the connection in which it occurs to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility,

of a court or commission taking into view the various and continually changing facts that bear upon the question and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just.

The effect of these decisions is thus expressed by Mr. Justice Harlan in his dissenting opinion (p. 176):

I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports and to issue protests. But it has been shorn by judicial interpretation of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of the competing railroad companies engaged in such commerce.

The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of

> the statutes in question they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce—when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I can not believe that Congress intended any such result, nor do I think its enactments, properly interpreted, would lead to such a result.

In view of these decisions, the public must look to competition for reasonable rates, not to the commission.

III.

It will probably be urged that any illegality in the agreement is cured by section 3 of Article VII (Rec., p. 29), which reads:

> SEC. 3. The powers conferred upon The Managers shall be so construed and exercised as not to permit violation of the interstate-commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and The Managers shall cooperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder.

An injunction to construe and exercise powers conferred so as to permit no violation of law, is an admission that the powers may be so construed and exercised as to violate law. If the anti-trust law prohibited only those contracts in unreasonable restraint of trade or commerce there might be saving force in this section. But the anti-trust law prohibits *all* contracts in restraint of trade or

commerce. Whether the rates be reasonable or unreasonable, an agreement providing for their establishment and maintenance by an association of interstate railways, is prohibited. The Managers can exercise none of the essential powers conferred by the agreement without violating the law. In the matter of the essential powers, it is not a question of method or degree; the powers can not be exercised, because they are in themselves illegal. The Association itself is illegal. It is formed for the purpose of controlling certain competitive traffic. The central authority, The Managers, is given the power to establish and maintain rates on that traffic. Take away from The Association the power to establish and maintain rates, and it immediately falls to pieces. It ceases to have a *raison d' être*.

The Managers are directed to cooperate with the Interstate Commerce Commission "to secure stability and uniformity" in the rates, etc., "established hereunder." But no rates can be "established hereunder" without violating the anti-trust law. It will be observed that The Managers are not instructed to cooperate in securing *reasonable* rates. The latter part of this section is inserted to support not the real but the ostensible purpose of The Association, namely, of aiding the Interstate Commerce Commission to enforce the law. Assuming the commission powerless to enforce the law, the railroads ignored both the commission and the law, and proceeded to form an association outside of the law, and in violation of the law, to aid in enforcing the law. The railroads shatter the law, and then combine to support the fragments.

IV.

It was contended below that the bill was multifarious. There is but one cause of action in the bill, namely, the agreement. Upon that the bill is based. It seeks to enjoin the execution of an illegal contract. The averments of intent in the bill are unnecessary and immaterial. At the most they are conclusions of law. The court will examine the agreement and determine the question of law with respect to its meaning and effect; will determine whether the agreement restrains trade or commerce in any way so as to violate the law. If the agreement is prohibited by the anti-trust law, the court will enjoin its execution; and the court will do this irrespective of whether the agreement does or does not also violate the interstate-commerce act, or those general principles of law which prevent any interference with interstate commerce.

It is not necessary for the Government to insist that the agreement violates more than one law. It is clearly illegal as a contract in restraint of trade or commerce under the anti-trust law. The fact that it also violates some other law, if it does, assuredly will not cure its illegality under this law, or prevent the court from enjoining its execution. A thing which is doubly bad does not, therefore, become good. The rule of double negatives does not apply. Nor is the Government deprived of the power to restrain the execution of a contract in restraint of trade or commerce under the anti-trust law because the contract contains a provision under which individuals have committed, or may com-

mit, offenses punishable under the interstate-commerce act. If a man threatens my life I am not to be deprived of the right to put him under bond to keep the peace because he has also stolen my property.

V.

The authority of the Government to maintain this suit is sustained in *United States* v. *Freight Association* (166 U. S., 290, 343), citing *in re Debs* (158 U. S., 564); *Cincinnati, New Orleans, etc., R. R.* v. *Interstate Commerce Commission* (162 U. S., 184); *Texas and Pacific R. R.* v. *Interstate Commerce Commission* (162 U. S., 197).

VI.

For the convenience and information of the court, I have printed with this brief the following:

Appendix A.—Joint Traffic and Trans-Missouri agreements.

Appendix B.—Extracts from Senate Document 133, Fifty-fifth Congress, second session, showing operation of Joint Traffic agreement.

Appendix C.—Cases under anti-trust laws decided subsequent to the Trans-Missouri decision.

It is submitted that the judgments of the lower courts should be reversed.

JOHN K. RICHARDS,
Solicitor-General.

FEBRUARY 18, 1898.

APPENDIX A.

Joint Traffic Association.

PREAMBLE.

Purposes of this agreement.

To aid in fulfilling the purposes of the Interstate Commerce Act, to cooperate with each other and adjacent transportation associations, *to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic*, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service, the Allegheny Valley Railway Company, Baltimore and Ohio Railroad Company, Baltimore and Ohio Southwestern Railway Company, Central Railroad Company of New Jersey, Chesapeake and Ohio Railway Company, Chicago and Erie Railroad Company, Chicago and Grand Trunk Railway Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Delaware, Lackawanna and Western Railroad Company, Detroit, Grand Haven and Milwaukee Railway Company, Erie Railroad Company, Grand Rapids and Indiana Railroad Company,

Transmissouri Freight Association.

Memorandum of agreement made and entered into this 15th day of March, 1889, by and between the following railroad companies, viz: Atchison, Topeka and Santa Fe Railroad, Chicago, Rock Island and Pacific Railway, Chicago, St. Paul, Minneapolis and Omaha Railway, Burlington and Missouri River Railroad in Nebraska, Denver and Rio Grande Railroad, Denver and Rio Grande Western Railway, Fremont, Elkhorn and Missouri Valley Railroad, Kansas City, Fort Scott and Memphis Railroad, Kansas City, St. Joseph and Council Bluffs Railroad, Missouri Pacific Railway, Sioux City and Pacific Railroad, St. Joseph and Grand Island Railroad, St. Louis and San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto, witnesseth, for the purpose of mutual protection, *by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local*, the subscribers do hereby form an association, to be known as the Transmissouri Freight Association,

Grand Trunk Railway Company of Canada, Lake Shore and Michigan Southern Railway Company, Lehigh Valley Railroad Company, Michigan Central Railroad Company, New York Central and Hudson River Railroad Company, New York, Chicago and St. Louis Railroad Company, New York, Ontario and Western Railway Company, Northern Central Railway Company, Pennsylvania Company, Pennsylvania Railroad Company, Philadelphia and Reading Railroad Company, Philadelphia, Wilmington and Baltimore Railroad Company, Pittsburgh and Lake Erie Railroad Company, Pittsburgh and Western Railway Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, Terre Haute and Indianapolis Railroad Company (Vandalia Line), Toledo, Peoria and Western Railway Company, Wabash Railroad Company, West Shore Railroad Company, do hereby constitute the Joint Traffic Association (hereinafter called The Association), and make this agreement for the purpose of carrying out the objects above named. Other companies may become members of The Association as provided in Article III.

ARTICLE I.

Boards of Administration.

SECTION 1. The affairs of The Association shall be administered by three boards, with duties as hereinafter specified:

(*a*) A Board of Control.

(*b*) A Board of Managers hereinafter called The Managers.

and agree to be governed by the following provisions:

ARTICLE I.

1. The traffic to be included in the Transmissouri Freight Association shall be as follows: *All competitive traffic between points* in the following-described territory: Commencing at the Gulf of Mexico on the ninety-fifth meridian, thence north to the Red River; thence via that river to the eastern boundary of the Indian Territory; thence north by said boundary line and the eastern line of the State of Kansas to the Missouri River at Kansas City; thence via said Missouri River to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line—the foregoing to be known as "The Missouri River line;" thence via said international line to the Pacific Coast; thence via the Pacific Coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico; and thence via said Gulf to the point of beginning, including business between points on the boundary line as described.

2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri River line.

[Exceptions omitted.]

ARTICLE II.

SECTION 1. The association shall, by unanimous vote, *elect a chairman of the* organization.

(c) A Board of Arbitration hereinafter called The Arbitrators.

SEC. 2. Wherever the term traffic is used herein it means both freight and passenger traffic.

ARTICLE II.

Traffic subject to The Association.

SECTION 1. The Association shall have jurisdiction *over all competitive traffic* (subject to the exceptions noted in section 2 of this article) which passes to, from, or through the western termini of the trunk lines, viz, Toronto, Canada; Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk, and Salamanca, N. Y.; Erie, Pittsburg, and Allegheny, Pa.; Bellaire, Ohio; Wheeling, Parkersburg, Charleston, and Kenova, W. Va., and Ashland, Ky.; and such other points as may hereafter be designated by The Managers as such termini; also all traffic which may pass through other junctions of the companies parties hereto, which is included when passing through any of the termini or junctions above or hereafter specified, and such other traffic as may by common consent of the parties be hereafter included herein.

SEC. 2. The following shall not be included:

(a) Coal, coke, iron ore, mill cinder, limestone, and petroleum, crude or refined.

(b) Traffic destined to or coming from Florida, Georgia, North and South Carolina, Virginia. The chairman may be removed by a two-thirds vote of the members.

SEC. 2. There shall be regular meetings of The Association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting—regular or special—is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. *Each road shall designate to the chairman one person who shall be held personally responsible for votes on that road.* Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend he shall send a substitute with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

SEC. 3. *A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines.* Their conclusions, when unanimous, shall be made effective when they so order, but if they differ, the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree, it shall be arbitrated in the manner provided in Article VII.

and West Virginia south of the south line of the Chesapeake and Ohio Railway.

ARTICLE III.

The Board of Control.

SEC. 1. *The presidents of the companies* forming The Association, and of such other companies as may become parties hereto, *shall constitute the Board of Control*, which shall meet on the written request of any three of its members.

SEC. 2. In case of the absence of any member of the Board of Control from a meeting the next ranking officer in such company having jurisdiction over traffic will have authority to act in his place and stead.

SEC. 3. Each member of the Board of Control shall be entitled to one vote, except that no system as designated in article 4 shall have more than three votes in the aggregate. It shall require three-fourths of the entire number of authorized votes to adopt any proposition coming before the Board of Control.

SEC. 4. The Board of Control shall fix the salaries of any Commissioners appointed by the managers. The salaries of other officers and employees of The Association shall be subject to its review and approval. The Board of Control shall select the arbitrators and fix their compensation and term of service.

SEC. 5. The Board of Control shall appoint an auditing committee, who shall examine and report to it upon the accounts of The Association.

SEC. 6. The Board of Control shall prescribe the conditions

SEC. 4. *At least five days' written notice* prior to each monthly meeting shall be given the chairman *of any proposed reduction in rates* or change in any rule or regulation governing freight traffic.

SEC. 5. At each monthly meeting *The Association shall consider and vote upon all changes proposed*, of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give The Association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of The Association: *Provided*, That if the member giving notice of the change shall fail to be represented at the meeting no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then The Association may, by a majority vote, upon such other traffic put into effect corresponding rates, to take effect upon the same day. By unanimous consent, any rate, rule, or regulation relating to freight traffic may be modified at any meeting of The Association without previous notice.

SEC. 6. Notwithstanding anything in this article contained, *each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not*

and rules under which additional railway systems or companies shall become parties hereto and be represented upon the Board of Managers.

SEC. 7. *Only the Board of Control shall consider appeals from the action of the managers on all questions as to rates or fares; except differentials.*

SEC. 8. *Pending decisions by the Board of Control, the decisions and orders of the managers shall prevail.*

ARTICLE IV.

The Board of Managers.

SECTION 1. The Board of Managers shall consist of not less than nine members, of which each of the following nine systems shall designate one:

Baltimore and Ohio system, now comprising the Baltimore and Ohio Railroad Line from Philadelphia to Parkersburg and from Philadelphia to Chicago via Wheeling and via Pittsburg and Connellsville; Baltimore and Ohio Southwestern; Cleveland Terminal and Valley, and the Pittsburg and Western Railroad companies, and all their leased, controlled, or operated lines.

Chesapeake and Ohio system, now comprising the Chesapeake and Ohio; Cleveland, Cincinnati, Chicago and St. Louis, and lines composing that system, and the Peoria and Eastern Railroad companies, and all their leased, controlled, or operated lines.

Erie system, now comprising the Erie Railroad Company; the Chicago and Erie Railroad Company, and all their leased, controlled, or operated lines.

members of The Association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet competition of lines not members of The Association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and if The Association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition the member offending shall be subject to the penalty provided in section 8 of this article. If The Association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

SEC. 7. All agreements with connecting lines for a division of through rates relating to traffic covered by this agreement shall be made by authority of The Association: *Provided, however,* That when one road has a proprietary interest in another, the division of such rates shall be what they may elect, and shall not be the property of The Association: *Provided further,* That as regards traffic contracts at this date actually existing between lines not having common proprietary interests the same shall be reported, so far as divisions are concerned, to The Association, to the end that divisions with the competing lines may, if thought advisable by them, be made on equally favorable terms.

Grand Trunk system, now comprising the Grand Trunk Railway Company of Canada and its affiliations west of the St. Clair River, viz, the Chicago and Grand Trunk; Cincinnati, Saginaw and Mackinaw; Detroit, Grand Haven and Milwaukee; Michigan Air Line, and the Toledo, Saginaw and Muskegon railway companies, and all their leased, controlled, or operated lines.

Lackawanna system, now comprising the Delaware, Lackawanna and Western Railroad Company and its leased lines; and the Syracuse, Binghamton and New York Railroad Company, and all their leased, controlled, or operated lines.

Lehigh Valley system, now comprising the Lehigh Valley Railroad Company and all its leased, controlled, or operated lines.

Pennsylvania system, now comprising the Allegheny Valley; Cumberland Valley; Cincinnati and Muskingum Valley; Grand Rapids and Indiana; Northern Central; Pennsylvania; Pennsylvania Company; Philadelphia, Wilmington and Baltimore; Pittsburgh, Cincinnati, Chicago and St. Louis, and the Terre Haute and Indianapolis (Vandalia Line) railroad companies, and all their leased, controlled, or operated lines.

Vanderbilt system, now comprising the Beech Creek; Canada Southern and its leased lines; Dunkirk, Allegheny Valley and Pittsburg; Lake Shore and Michigan Southern; Michigan Central and its leased lines; New York Central and Hudson River; New York, Chicago and St. Louis; Pittsburgh and Lake

SEC. 8. [As amended.] It shall be the duty of the chairman to investigate all apparent violations of the agreement and to report his finding to the managers, who shall determine, by a majority vote (a member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, *the amount of each fine not to exceed $100, to be paid to The Association.* If any line party hereto agrees with a shipper or anyone else to secure a reduction or change in rates or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

Resolved, That the chairman has authority to examine all books, papers, and contracts relating to traffic covered by this agreement for the purpose of ascertaining if violations of the same exist; that the chairman may conduct such examination in any manner he may elect.

SEC. 9. When a penalty shall be declared against any member of this Association the chairman shall notify the manager of such company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine, and the draft, when presented, shall be honored by the company thus assessed.

SEC. 10. All fines collected to be used to defray the expenses of The Association, the offending party not to be benefited by the amounts it may pay as fines.

Erie; Rome, Watertown and Ogdensburg; Walkill Valley, and the West Shore railroad companies, and all their leased, controlled, or operated lines.

Wabash system, now comprising the Wabash Railroad Company and all its leased, controlled, or operated lines east of the Mississippi River.

SEC. 2. Additional managers representing other systems or companies which are now or may hereafter become parties to this agreement, may be designated as such systems or companies under the authority and rules of the Board of Control.

SEC. 3. Each manager shall hold office during the continuance of this agreement, subject to the pleasure of, and shall be compensated by, the system appointing him.

ARTICLE V.

Relating to the duties and powers of the managers.

SECTION 1. The managers shall have their principal office in New York City and shall continue in session subject to their rules. They shall elect a chairman annually.

SEC. 2. The managers shall adopt their rules and perfect their organization. It shall, however, require the affirmative votes of three-fourths of their entire number to adopt any proposition coming before them.

SEC. 3. In considering questions which exceptionally affect the interests of any company party hereto unrepresented upon the Board of Managers, such company shall be advised thereof and be afforded an opportunity

SEC. 11. Any member not present or fully represented at roll call of general or special meetings of the Freight Association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

ARTICLE III.

The duties and powers of the chairman shall be as follows:

SECTION 1. He shall preside at all meetings of The Association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by The Association.

SEC. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the members hereto agrees to furnish such number of copies of rates, rules, and regulations issued by it as the chairman may require.

SEC. 3. *He shall construe this agreement and all resolutions adopted thereunder*, his construction to be binding until changed by a majority vote of The Association.

SEC. 4. He shall publish in convenient form all rates, rules, and regulations which are general in their character and apply throughout the territory of The Association, and shall also publish, in the manner above, such

under the rules of the managers for presenting to them its views before final action is taken.

SEC. 4. *The managers shall construe this agreement and all resolutions adopted thereunder.*

SEC. 5. *All applications for differentials and for changes in rates, fares, charges, and rules shall be made to the managers. Their action upon differentials and upon all questions except as to rates and fares shall be subject to appeal, but only to the arbitrators. Their action as to rates and fares (except differentials) shall be subject to appeal only to the Board of Control. Decisions and orders of the managers shall be complied with until such appeals are decided.*

ARTICLE VI.

Appointment of commissioners.

The managers may appoint not more than three commissioners, and shall define their powers and duties.

ARTICLE VII.

Rates, fares, charges, and rules.

SECTION 1. The duly published schedules of rates, fares, and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), *are hereby reaffirmed* by the companies composing The Association, and the companies parties hereto shall within ten days after this agreement becomes effective file with the managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto.

rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

SEC. 5. He shall be furnished with copies of all waybills for freight carried under this agreement, when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

SEC. 6. He shall render to each member of The Association monthly statements of the expenses of The Association, showing the proportions due from each, and shall make drafts upon the members for the different amounts thus shown to be due.

SEC. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of fines for such violations, as provided for herein.

SEC. 8. The chairman shall be empowered to authorize lines in The Association to meet the rates of any other line or other lines in The Association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

SEC. 9. Only the parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3, Article III, of the agreement.

SEC. 2. *The managers shall* from time to time *recommend such changes* in said rates, fares, charges, and rules as may be reasonable and just and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and *the failure to observe such recommendations* by any party hereto as and when made shall be deemed *a violation of this agreement*. No company party hereto shall, through any of its officers or agents, deviate from or change the rates, fares, charges, or rules *herein reaffirmed or so recommended* by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective *until thirty days after the receipt* of such resolution by the managers. *The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.*

SEC. 3. The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall cooperate with the Interstate Com-

ARTICLE IV.

Any willful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of the agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

ARTICLE V.

The expenses of The Association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to The Association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

ARTICLE VI.

There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employees, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

ARTICLE VII.

In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before The Association,

merce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder.

ARTICLE VIII.

Propositions of competitive traffic.

The managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement, so far as can be legally done.

ARTICLE IX.

Relations to nonconcurring companies and revisions of rates and fares.

SECTION 1. The manager shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement, which fail or decline to observe the rates, fares, charges, and rules established under this agreement. The interests of companies parties hereto injuriously affected by such action of the managers shall, in such instances, be accorded reasonable protection in so far as the managers can legally do so.

SEC. 2. When in their judgment necessary to the purposes of this agreement, the managers may determine the divisions of rates and fares between connecting companies parties hereto and between them and connections not parties hereto, keeping in view uniformity and the equities involved.

it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: *Provided, however*, that in case of arbitration in which the members of this Association only are interested they may, by unanimous vote, substitute a special board.

ARTICLE VIII.

This agreement shall take effect April 1, 1889, subject *thereafter to thirty days' notice of a desire on the part of any line to withdraw from* or amend the same.

ARTICLE X.

Limitation of powers of freight lines.

It is recognized and agreed that economy in the operation of through cooperative and commission freight lines and the limitation or termination of many of their existing powers and functions are absolutely required, and the companies parties hereto will actively cooperate with the managers and so manage such lines as to accomplish such results.

ARTICLE XI.

Managers may organize joint agencies.

The managers shall have authority to organize such joint freight and passenger agencies as they may deem desirable, provided that if such joint agencies are established they shall be so arranged as will give proper representation to each company party hereto.

ARTICLE XII.

Managers to approve contracting agencies.

No soliciting or contracting passenger or freight agency shall be maintained, directly or indirectly, by any of the companies parties hereto, or by any freight line in connection with the traffic covered by this agreement, except with the approval of the managers; and no person who is decided by the managers to be objectionable shall be employed or continued in such agency.

ARTICLE XIII.

Managers to define duties of contracting agents.

SECTION 1. The managers shall define the authority and duties of all persons acting as contracting and soliciting freight and passenger agents in relation to the traffic covered hereby, and, with due regard to the relative interests involved, they may determine the number of such persons to be employed. The parties hereto shall observe and enforce the orders of the managers from time to time issued in that behalf.

SEC. 2. Such contracting and soliciting agents as the managers appoint shall be carried upon the pay rolls of The Association.

SEC. 3. The Grand Trunk Company may appoint soliciting agents, to be located at such points in Canada as may be necessary to meet the competition of Canadian lines not parties hereto; but such persons shall, in all respects, be subject to the rules of the managers.

ARTICLE XIV.

Complaints and investigations thereof.

When in the judgment of the managers their information or any complaint so warrants, the officials and employees of the companies parties hereto may be examined, and in such investigation any or all officials or employees may be notified to attend, and any or all matters affecting directly or indirectly the traffic herein covered may be considered.

ARTICLE XV.

Reports and data to be furnished.

The companies parties hereto agree to furnish to the managers all reports, papers, and information relating to the traffic covered hereby which may be requested by them.

ARTICLE XVI.

Forfeitures for violations of agreement.

For any action by any party hereto which *in the judgment of the managers* constitutes a violation of this agreement the offending company shall forfeit to The Association a sum to be determined by the managers, *not exceeding $5,000*, but where the gross receipts of the transaction in which this agreement is violated shall exceed $5,000 the offending party shall, at the discretion of the managers, forfeit a sum not exceeding such gross receipts. Such forfeitures shall be applied to the payment of the expenses of The Association, except that the offending company shall not participate in such application of its own forfeiture.

ARTICLE XVII.

Deposits, expense fund, and provision for forfeitures.

SECTION 1. Upon the call of the managers after this agreement becomes effective each company party hereto shall deposit with them the sum of $5,000, and in addition thereto, upon their like call, such further sums monthly, based upon the gross earnings of each company

party hereto from the traffic covered hereby, as the managers may decide to be necessary to defray the expenses of The Association, including the salaries of the commissioners and arbitrators, and to provide for such forfeitures as may be adjudged.

SEC. 2. Any forfeiture made by any company party hereto, under the rules, shall be taken from the sums contributed by such company and charged in whole to its account. If this deposit at the time, exclusive of its said original contribution of $5,000, shall be insufficient, it shall pay to the managers such deficiency within fifteen days after the forfeiture is finally adjudged.

SEC. 3. The balance of said deposits remaining at the expiration of this agreement shall be divided between the companies then parties hereto in the ratio in which they have contributed, less the amounts forfeited.

ARTICLE XVIII.

Retirement from the agreement.

Any party retiring from this agreement before the final completion of the time herein fixed, except by unanimous consent of the parties hereto, shall not be entitled to any refund from the residue of deposits remaining at the close of this agreement, but if any company fails to observe and be governed by this agreement, which fact shall be determined by the arbitrators, and then fails to pay its forfeitures within fifteen days after such decision of the arbitrators, then any other company may withdraw from this agreement upon

giving thirty days' written notice to the managers, and such company so withdrawing shall be entitled to the residue of the funds it has contributed.

ARTICLE XIX.

Board of Arbitration.

SECTION 1. There shall be a permanent Board of Arbitration, consisting of three disinterested persons, to which appeals shall be made as to all questions, including differentials, arising under this agreement, *except the determination of rates and fares.*

SEC. 2. All differences between the parties hereto as to any lawful measure necessary to carry out the objects of The Association, except as to rates and fares, shall be submitted to and be finally decided by the arbitrators.

SEC. 3. Pending decisions of the arbitrators, the decisions and orders of the Board of Control and managers shall prevail.

SEC. 4. Hearings shall be had upon all questions arbitrated, under the rules established by the arbitrators and approved by the Board of Control, and the decision of the arbitrators or of any two of them shall be final.

ARTICLE XX.

Amendments.

Amendments to this agreement shall only be made by the unanimous vote of the parties hereto.

ARTICLE XXI.

When agreement becomes effective, and its duration.

SECTION 1. This agreement shall not be effective until it shall have been approved by the boards of directors of the several companies parties hereto. Certified copies of resolutions giving such approval shall be filed with the managers.

SEC. 2. This agreement shall *take effect January 1, 1896, and shall continue in existence for five years thereafter.* After said period any company may retire therefrom *upon giving ninety days' written notice* of its desire to do so.

The Philadelphia and Reading Railroad Company being legally incapacitated from signing this contract at present, but having so far as it can do so indicated through its president and receivers and proposed reorganization committee its desire to act in harmony therewith and observe its terms, it is understood that the parties hereto will waive the signature of that company until it is reorganized, and be bound by this agreement only so long as that company observes its conditions, which fact shall be determined by the arbitrators provided herein.

In witness whereof the corporations parties hereto have caused the foregoing agreement to be signed by their respective presidents and the seal of their respective corporations to be attached hereto.

APPENDIX B.

EXTRACTS FROM SENATE DOCUMENT NO. 133, FIFTY-FIFTH CONGRESS, SECOND SESSION.

Contains a transcript of testimony taken at a public inquiry by the Interstate Commerce Commission into the management of the business of the common carriers, subject to the act to regulate commerce in transporting grain and grain products from Chicago to the Atlantic seaports in the first quarter of the year 1897. The railroad companies, parties to the joint traffic agreement, were parties to the inquiry, and were represented at the taking of the testimony.

The testimony establishes that to carry into effect the *joint traffic agreement*, the *Board of Arbitrators* provided for in article 19 of that agreement made a decision or award in which the competitive traffic contemplated in said agreement, east bound from Chicago, was reduced to an equivalent sixth-class tonnage basis and then divided by fixed percentages between the roads, parties to the joint traffic agreement.

The following (from page 23, Senate Document No. 133) is a copy of

THE POOLING AWARD.

Arbitrators' award in the division of east-bound traffic from Chicago and Chicago junctions which comes under contract of Joint Traffic Association.

After due consideration of the arguments presented and the statistics of traffic forwarded in the past, the

arbitrators' award is that the east-bound shipments of live stock and dressed meats from Chicago and Chicago junctions, included in this reference, reduced to an equivalent sixth-class tonnage basis, be apportioned between the lines in interest from and after September 1, 1896, as follows:

	Per cent.
Baltimore and Ohio Railroad	4.5
Cleveland, Cincinnati, Chicago and St. Louis Railway	1.1
Chicago and Erie Railroad	9.4
Chicago and Grand Trunk Railway	13.2
Lake Shore and Michigan Southern Railway	19.8
Michigan Central Railroad	16.1
New York, Chicago and St. Louis Railroad	11.3
Pittsburg, Cincinnati, Chicago and St. Louis Railway	10.7
Pittsburg, Fort Wayne and Chicago Railway	8.7
Wabash Railroad	5.2
Total	100

And that the east-bound dead freight tonnage from Chicago and Chicago junctions, covered by this reference, reduced to an equivalent sixth-class basis, be apportioned between the lines in interest from and after September 1, 1896, as follows:

	Per cent.
Baltimore and Ohio Railroad	8
Cleveland, Cincinnati, Chicago and St. Louis Railway	5.8
Chicago and Erie Railroad	11.2
Chicago and Grand Trunk Railway	11
Lake Shore and Michigan Southern Railway	14.2
Michigan Central	13.6
New York, Chicago and St. Louis Railroad	8.2
Pittsburg, Cincinnati, Chicago and St. Louis Railway	7
Pittsburg, Fort Wayne and Chicago Railway	14.2
Wabash Railroad	6.6
Total	100

October 30, 1896.

The testimony of JAMES L. CLARK, general Western freight agent of the Lake Shore and Michigan Southern, page 24 et seq., establishes in part how

THE POOL IN RESTRAINT OF COMPETITION WAS EFFECTED.

He testified (p. 7, Senate Doc. 133) that to carry into effect the award of the Joint Traffic Arbitrators, and (Doc., p. 34) under the direction of G. J. Grammar, of the Lake Shore and Michigan Southern Railway (see p. 24)—

"We diverted to the Nickel Plate (New York, Chicago and St. Louis Railway) from February 26 and up to April 1 (1897), and during that time diverted to the Nickel Plate Railroad 364 cars, amounting to 12,466,140 pounds of traffic."

L. BRIGGS, commercial agent at Chicago of the New York, Chicago and St. Louis Railway (The Nickel Plate), testified at page 39, et seq., Senate Document 133, that the receivers of the Baltimore and Ohio Railroad had, at Chicago, February 26 to May 18, 1897, turned over to the New York, Chicago and St. Louis Railway 365 carloads of traffic (Doc., p. 58), containing 15,000,000 pounds of traffic that had been received at Chicago by the Baltimore and Ohio road for transportation to points on the Baltimore and Ohio road, and was loaded in Baltimore and Ohio cars (Doc., p. 44).

This traffic was by the New York, Chicago and St. Louis Railway carried to Painesville, Ohio, and there turned back to the Pittsburg and Western Railway, a branch of the Baltimore and Ohio system.

The New York, Chicago and St. Louis Railway received for the haul to Painesville divisions varying from 35 to 46.5 per cent of the rate from Chicago to destination of the traffic (p. 58, Doc. 133).

A. P. BIGELOW, general Western freight agent for the Baltimore and Ohio road, testified that he was an agent for the receivers for that road (p. 73, Sen. Doc. 133) and delivered from the Baltimore and Ohio Railroad to the

New York, Chicago and St. Louis Railway some east-bound traffic. When asked how he came to deliver the traffic to that road, said (Doc., p. 74):

"Mr. BIGELOW. I will state my understanding of it. As I understand it, the trunk lines engaged in some strife for traffic tacitly agreed that there should be some kind of restraining influence or some material manifestation of sincerity and good faith toward one another, and agreed, if I may put it that way, that they would confine their tonnage to within certain limits. The Baltimore and Ohio simply exceeded its proportion, and in order to establish the fact that it was maintaining the rates and acting in good faith, and as material evidence of that, it turned some of its east-bound traffic over to the New York, Chicago and St. Louis road."

That this official was conscious that giving away this traffic to a competing line was practical proof that the joint traffic agreement was designed to be and was in fact a pooling agreement is shown by his evasive and reluctant testimony. (See pp. 74 to 79, Sen. Doc. 133.)

On pages 77 and 78 the witness was asked the following:

"Mr. DAY. Do you know of any instance where you gave away traffic that your road had obtained—gave it away to a competitor—since the road went into the possession of Federal receivers, other than the Nickel Plate case?

"Mr. BIGELOW. I do not recall any.

"Mr. DAY. Are you able to say there is a precedent for it?

"Mr. BIGELOW. With our company?

"Mr DAY. Yes, sir; representing the Baltimore and Ohio Company or the Baltimore and Ohio receivers?

"Mr. BIGELOW. I do not recall whether there was a precedent or not for the action."

He was also asked (Doc., p. 75):

"Mr. DAY. Did you receive any advice from Mr.

Wright (general traffic manager of the Baltimore and Ohio) directing you to turn over this traffic to another competing line?

"Mr. BIGELOW. I do not recall that I received any specific instructions from him.

"Mr. DAY. Did you receive any instructions verbally or in writing?

"Mr. BIGELOW. Not that I recall; I may have.

"Mr. DAY. Did you have any correspondence with him in reference to it?

"Mr. BIGELOW. Not that I recall.

"Mr. DAY. Did you advise him what you had done?

"Mr. BIGELOW. I do not think so.

"Mr. DAY. Did you advise anybody?

"Mr. BIGELOW. I do not think so. The statistics show what was done."

A short time after Mr. Bigelow had testified that he could recall no instance excepting the case of the Nickel Plate road where the Baltimore and Ohio road had given away a part of its traffic to another railroad, and after he had testified that he could recall no conversation or instructions from his general traffic manager, C. V. Wight. Another witness, Mr. James McCrea, *vice-president* of the Pennsylvania Company, testified, and as a part of his testimony produced the correspondence, copies of which appear on pages 96 to 101, Senate Document 133. This correspondence relates to traffic which the Baltimore and Ohio Railroad subsequently, under the direction of Mr. Bigelow, at Chicago, turned over to the Pennsylvania Company.

The first of these letters, which bears date of December 11, 1896 (p. 100, Senate Doc. 133), and one dated January 14, 1897 (p. 99, Senate Doc. 133), show that the witness Bigelow not only personally supervised the turning over several thousand tons of traffic to another line than the Nickel Plate, none of which he could recall when he was a witness, but in company with his superior,

Mr. Wight, personally called on the general freight agent of the Pennsylvania Railroad to arrange the details and division of expenses connected therewith. Messrs. Bigelow and Wight expressed some doubt of getting the permission of the court to divide their traffic.

The letter of January 14, 1897, shows that additional burdens were put on this traffic or unnecessary expenses were incurred for switching from the Baltimore and Ohio tracks to the Pennsylvania rails at Chicago, and from the Pennsylvania rails back to the Baltimore and Ohio rails at Allegheny, which would have been unnecessary had the traffic been carried through by the Baltimore and Ohio road as it was originally consigned and billed. The switching charged at Allegheny was necessary to get the traffic back to the Baltimore and Ohio rails, because the traffic was destined for points on the Baltimore and Ohio road east of Pittsburg.

[Senate Document 133, p. 100.]

PENNSYLVANIA COMPANY,
GENERAL WESTERN FREIGHT AGENT.
Chicago, Ill., December 11, 1896.

Mr. C. L. COLE,
General Freight Agent, Pittsburg, Pa.

DEAR SIR: Manager Freight Traffic Wight and General Western Freight Agent Bigelow, of the Baltimore and Ohio, have just been in this office and interviewed us in regard to their excess tonnage out of Chicago. They desire to know if, in the event that they diverted grain to our line at South Chicago, on account of our shortage, if we would resurrender the traffic to their system, the Pittsburg and Western, at Pittsburg.

The gentlemen named stated that while they did not know whether the courts would permit them to deliver traffic to us, they being in the hands of a receiver, still

they would like to know if we would redeliver the property to them at Pittsburg, as indicated, and also to pay a reasonable switching charge for delivering the property to us at South Chicago. If we assent to these conditions they will take the matter in hand to see whether they could get permission to divert grain traffic to us.

Heretofore, as you are aware, traffic has been received by Eastern lines from those in excess by those in deficit with the understanding that it was to be surrendered to the originating line again at the western termini, and it has also been customary to pay a reasonable switching charge at the point where the grain is diverted.

We do not know how genuine this proposition is, but it might be well to test their sincerity and agree to the conditions named for which there has been precedent heretofore.

Kindly advise us by wire early to-morrow morning, as Mr. Wight desires to leave the city some time during the day.

Yours, truly, WM. BORNER, *G. W. F. A.*

[Page 99, Senate Document 133.]

PENNSYLVANIA COMPANY,
GENERAL WESTERN FREIGHT AGENT,
Chicago, Ill., January 14, 1897.

Mr. WM. BORNER,
G. W. F. A., Pennsylvania Company, Chicago.

DEAR SIR: With further reference to our conversation yesterday concerning diversions from this company to your line, we will begin at once to turn over to your company what freight we can consistently, making deliveries to you at South Chicago. The cars will be accompanied by transfer freight bills, which will give you full shipping instructions, contents of cars, weight, etc. It is to be understood that you will bill this freight to

Allegheny and surrender it back to our company at that point. The divisions applicable upon the traffic, according to our figures, will be as follows:

	Miles.
Baltimore, Md.:	
Pennsylvania Company, South Chicago to Allegheny	456
Baltimore and Ohio, Allegheny to Baltimore	333
Total mileage	789
Percentage proportion, Pennsylvania Company	57.8
Percentage proportion, Baltimore and Ohio	42.2
Washington, D. C.:	
Pennsylvania Company, South Chicago to Allegheny	456
Baltimore and Ohio, Allegheny to Washington	307
Total mileage	763
Percentage proportion, Pennsylvania Company	59.8
Percentage proportion, Baltimore and Ohio	40.2
Philadelphia, Pa.:	
Pennsylvania Company, South Chicago to Allegheny	456
Baltimore and Ohio, Allegheny to Philadelphia	429
Total mileage	885
Percentage proportion, Pennsylvania Company	51.5
Percentage proportion, Baltimore and Ohio	48.5

In billing this freight you will deduct the following arbitraries before prorating: On dead freight for Baltimore, Philadelphia, and Washington, 1½ cents per 100 pounds. There is a junction railroad transfer charge between Allegheny and Glenwood of 82 per car. This, however, we will include in our statement to you of the terminals which must be borne by the property at Chicago. The Chicago terminals are of a varied character, which you fully understand, such as switching, trackage, transfer charges, etc. In order to simplify matters, we believe that these particular charges can be better adjusted in a statement independent of the original billing, and we will periodically, or at the time of the discontinuance of the diversions, render to your company a statement covering the Chicago terminal charges which are to be prorated, also the junction railroad transfer charge at Allegheny.

I would further request that in billing the diverted

freight from South Chicago you place prominently upon the waybills the term "Diverted freight from the Baltimore and Ohio road." We desire this notation made upon your billing in order that Chairman Tucker will be able to check same and give us due credit for all tonnage.

We trust that you will give all of the diverted freight very prompt movement.

Please acknowledge receipt by bearer, and state if the conditions contained herein meet with your approval.

Yours, truly,

A. P. BIGELOW, *G. W. F. A.*

[Page 98, Senate Document 133.]

[Personal.]

PENNSYLVANIA COMPANY,
GENERAL WESTERN FREIGHT AGENT,
Chicago, Ill., January 15, 1897.

Mr. C. L. COLE,
General Freight Agent, Pittsburg, Pa.

DEAR SIR: Regarding diversions from the Baltimore and Ohio, as indicated in letter from General Western Freight Agent A. P. Bigelow, which you saw here yesterday, copy of which we now inclose as per request, we have to advise further that this morning our agent from South Chicago, with the undersigned, met Messrs. Bigelow and Weyman, the latter the local agent of the Baltimore and Ohio, and had somewhat of a definite understanding in regard to the transaction of the business. Two cars of freight were delivered to us at South Chicago last night, and will go forward this evening; and in regard to which we will wire you, so that you can arrange, as suggested, for prompt movement through Allegheny to the Baltimore and Ohio.

The arrangements are as follows: All fixed expenses which the Baltimore and Ohio are subject to in gathering up this diverted traffic, such as stock-yard trackage, ele-

vator switching charges, etc., are to be prorated on per cents, as indicated in copy of letter inclosed. The fixed charges against us on diverted traffic are: First, switching charge of $2 for delivery via Junction Railroad, transfer between Allegheny and Glenwood; second, the actual cost of transferring grain from Western cars to Baltimore and Ohio cars, which will not exceed $1 per car; and third, the switching service of the Baltimore and Ohio, which has been agreed to by all concerned at $2 per car when freight originates at South Chicago on the Baltimore and Ohio, and $3 per car when such diverted freight originates on the tracks of the Baltimore and Ohio in this city or at the stock yards. The detail is to be carried out between the Baltimore and Ohio local agent and our own at South Chicago. So far as the switching arrangements at Chicago and South Chicago are concerned, it would seem as though we made as favorable an arrangement as possible, as our local agent was of the opinion, first, that a fair compensation would be about $3 per car on all traffic delivered us, and yet we succeeded in obtaining $2 on a portion of the traffic and $3 on the remainder.

Yours, truly,

WM. BORNER, *G. W. F. A.*

Mr. McCREA's testimony (p. 89, Sen. Doc.) and his letter dated November 13, 1897 (Sen. Doc., p. 96), shows the percentage of competitive traffic the Pennsylvania lines were entitled to under the arbitrators' award and in part how the traffic was divided:

PENNSYLVANIA LINES WEST OF PITTSBURG,
Pittsburg, Pa., November 13, 1897.

WILLIAM A. DAY, Esq.,
Counsel for the Interstate Commerce Commission,
Washington, D. C.

MY DEAR SIR: Absence from the office and the necessity for a very thorough search through our records have

prevented a more prompt response to the inquiries contained in your communication of October 29, asking for additional information in connection with my testimony before the Interstate Commerce Commission on July 20, 1897. I now beg to say:

First. That the total tonnage turned over to the Pennsylvania lines (Pittsburg, Fort Wayne and Chicago Railway) at Chicago and Chicago common points by the Baltimore and Ohio Railroad Company during the period between January 1 and April 15, 1897, was between 1,900 and 2,100 tons. If you want the details of this tonnage, showing dates, car numbers, etc., I shall be glad to furnish them, but it will take some time to obtain the information, as it will have to be worked up from our waybills, etc.

Second. Having reference to your request for copies of the correspondence, telegraphic or otherwise, that passed between the Pennsylvania Company or any of the officers or agents of the Pennsylvania system and the receivers or agents of the Baltimore and Ohio Railroad Company, relating to such traffic, at the time of my examination before the commission, I stated that I did not remember whether the arrangement had been a verbal or written one, but that I thought it was by letter or telegraph. In this I must have been mistaken, as I have been unable to find any correspondence on the subject, and, upon thinking the matter over, it seems to me, although I will not be positive, that it was a verbal arrangement between Receiver Murray and myself. The conversation, as I recollect it, was that Mr. Murray stated that they were considerably "over" in the volume of their Chicago business, and asked, if they turned some of it over to the Pennsylvania lines, whether we would redeliver same to the Baltimore and Ohio Railroad at Pittsburg, to which I replied, "certainly," and directed our then freight traffic manager to carry out the arrangement. I presume that Mr. Murray gave similar instruction to

his traffic officers, and that the correspondence (copy of which is inclosed herewith) resulted therefrom.

Third. Under the arbitrator's award of October 30, 1896, the Pennsylvania lines were entitled to carry 19.4 per cent of the east-bound live stock and 21.2 per cent of east-bound dead freight from Chicago and Chicago common points.

Very truly, yours,

JAMES McCREA,
Vice-President.

AGREEMENT OPERATES IN RESTRAINT OF TRADE AND COMMERCE.

The same Senate document (No. 133) shows that within two years after the *Joint Traffic Association agreement* became effective more than 1,200 freight circulars or rulings were promulgated by the *Board of Managers* (Doc., p. 102), and freight circulars Nos. 222 and 274, set forth in said Senate document (pp. 102–105), indicate the *authority exercised over rates under the agreement.*

Competition between carriers was restrained, and under *suspension of association rules* was permitted as to certain traffic described in association freight circulars Nos. 563 and 1369 (Sen. Doc. 133, pp. 105–107), but the competition allowed was restricted to that of carriers in the association with carriers not members of The Association.

The testimony of George R. Blanchard, commissioner of the Joint Traffic Association, in the case of *New York Produce Exchange* v. *Baltimore and Ohio Railroad Co. et al.*, and in which carriers members of that Association were principal defendants (Sen. Doc., p. 108), was given in New York before the Interstate Commerce Commission while this case of *United States* v. *Joint Traffic Association* was pending and about to be argued in that city before the circuit court of appeals. Though the witness was asked to describe the workings of The Association, he did

not mention or refer to the pooling of freight and division thereof under the previously made arbitration award. (Sen. Doc., p. 23.) *The fact of pooling under the agreement was suppressed.* This witness testified concerning the control by The Association and its officers. (Doc., pp. 108, 109, 110, 113, 114, 116, 117, 118, 125, 126, 127, 128, 129, 130, 131, 132.) In one portion of the testimony it appears stated that "the powers of The Managers, as stated in the contracts, are only recommendatory to the various companies." (Doc., p. 108.) The witness testified in another place to the effect that *a carrier member of The Association can not reduce its rate against the recommendation of The Managers, except on notice given by its Board of Directors.* (Doc., p. 117.)

A purpose of The Association is to maintain rates that have been established and to prevent changes not recommended by The Managers. (Doc., pp. 109, 117, 127, 129, 132, 133.)

"*Recommendations" of Association managers are invariably obeyed.* (Doc., p. 133.)

APPENDIX C.

CASES UNDER ANTITRUST LAWS SUBSEQUENT TO TRANS-MISSOURI DECISION.

[*National Harrow Co.* v. *Hench et al.*, 83 F. R., 36. Circuit court of appeals, third circuit. October 29, 1897.]

Numerous manufacturers of spring-tooth harrows throughout the United States organized into a corporation, and agreed to assign to said corporation all United States patents which they then owned or should thereafter acquire relating to float spring-tooth harrows, together with the good will of their business in such harrows, agreeing to be interested in such harrows only as agents of the corporation, and to manufacture same only as agents or licensees. Result that almost the entire output of these harrows in the United States was under the regulation and control of this organization—at least 90 per cent thereof.

Held, That the manifest purpose of the parties was to form a combination to prevent competition and enhance prices of these harrows; that such was the effect of their agreement.

"That such a contract should be unlawful seems clear. While it is true that all contracts in restraint of trade are not prohibited, and it is sometimes difficult to determine whether a particular one is, there is no room for doubt that such a contract as this, which provides for general and unlimited restraint, is unlawful."

The fact that several patentees are exposed to litigation does not justify the creation by them of monopolies to public disadvantage.

[*United States* v. *Hopkins et al.*, 82 F. R., 529. Circuit court, Kansas September 20, 1897.]

Defendants, about three hundred in number, are members of a voluntary unincorporated association. Substantially all the business relating to the handling of live stock at the Kansas City stock yards is carried on by defendants. Live stock is shipped from Nebraska, Colorado, Texas, and other States and Territories to defendants and sold by them to various packing houses in Kansas City, Mo., and Kansas City, Kans., and also shipped to other markets. Kansas City market is the second largest live stock market in the world, and the only available public market in an exceedingly large territory of the United States. If live stock is consigned to a person or partnership not member of said exchange, he is not permitted to dispose of same on Kansas City market, for the reason that defendants and all other commission merchants doing business at said yards are required by rules of said exchange not to deal in any manner with a person not a member of the exchange, such person being systematically blacklisted and boycotted. Free transmission of telegraphic information regarding the condition of the market is prevented.

Held, to be an illegal combination to restrict, monopolize, and control that class of trade.

Such combination is to be determined not alone from what appears upon the face of the preamble, rules, and by-laws of The Association, but from the entire situation and the practical workings and results of the defendants' methods of doing business.

"This act of Congress is aimed against all restrictions of interstate commerce, and we need not discuss the reasonableness of such instructions. It is evidently the purpose of the law to permit commerce between States to flow in its natural channels, unrestricted by any com-

binations, contracts, or conspiracies, or monopolies whatsoever."

Where live stock is shipped from other States and Territories to Kansas City and there unloaded and sold without regard to market, some shipped to other markets in other States, this is commerce between States. It does not cease to be the subject of interstate commerce when it reaches Kansas City, and is unloaded.

[*United States* v. *Addyston Pipe and Steel Co. et al.*, 78 F. R., 712. Circuit court, eastern district of Tennessee. February 5, 1897.]

Six companies combined together to monopolize the trade in cast-iron pipe in certain States and Territories of the United States, entering into a contract or association known as the Associated Pipe Works. The several companies agreed not to compete with each other, and, to make the arrangement effectual, agreed to charge a bonus upon all work done and pipe furnished, which bonus was to be added to the market price of the pipe sold.

There were *nine* other companies engaged in the manufacture and sale of cast-iron pipe in the territory sought to be monopolized, which was designated "pay territory." *Ten* other companies were similarly engaged outside of this territory, known as "free territory."

It is alleged that the combination had not been able to raise prices above a reasonable price. Restraining order was first allowed; case now heard upon application for a preliminary injunction.

Held, Federal authority has nothing to do with a monopoly or a contract in restraint of trade until it interferes directly and substantially with interstate commerce or commerce with foreign nations, and this must be directly and not incidentally. No such combination or intent shown. The Association's method of doing business has no direct relation to interstate commerce.

This case was reversed by the circuit court of appeals February 14, 1897, Judge Taft delivering the opinion. Justice Harlan, and Judges Taft and Lurton composed the court.

"DECISION OF THE COURT.

"The court of appeals held, first, that the contract of association, even if the prices fixed under it were reasonable, and its only purpose was to prevent ruinous competition, as claimed by defendants, was nevertheless void at common law because in restraint of trade and an attempted monopoly.

"Second. That the prices were not reasonable, and the purpose was an attempted monopoly.

"Third. That the trade restrained by the contract of association was the negotiation and sale of pipe to be delivered across State lines from the State of manufacture to the State of sale, and that this was, under all the decisions of the Supreme Court, interstate commerce.

"Fourth. As a conclusion from these premises that the contract of association was a restraint and burden on interstate commerce and a violation of the Federal anti-trust act, and should be enjoined."

[*Milwaukee Masons and Builders' Association* v. *Niezerowski*, 70 N. W. Rep., 166. Supreme court of Wisconsin. February 2, 1897.]

This corporation comprises sixty of the seventy or seventy-five mason contractors in Milwaukee. They had two sets of by-laws; one for general distribution, and the other private, which was carried into operation. The corporation had contracts with material men in the city by which members of the association could receive rebates of 33⅓ per cent upon all material furnished, thus enabling them to underbid nonmembers. All bids were first submitted to the association, who ascertained the lowest bidder, and then required him to add 6 per cent to

the amount of this before he should submit it to the person for whose work he was competing, and to pay said 6 per cent to the secretary of the association. The manifest purpose was by means of the combination to suppress fair and free competition.

One member of the association submitted a bid for the erection of a church directly to the congregation without consulting the association and without adding the 6 per cent. The association claimed that defendant should give his note for the usual percentage of 6 per cent, which he finally did. The action is upon this note.

Held, To be contrary to public policy, and therefore void.

"Agreements in restraint of trade are against public policy and void, unless founded upon a valuable consideration, and limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case."

The test whether the restraint is reasonable is laid down in *Horner* v. *Graves* (7 Bing., 735, 743), where it is said: "The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable."

[*National Harrow Company* v. *Bement & Sons*, 21 App. Div. (N. Y.), 290. Appellate division, supreme court of New York, fourth department. October term, 1897.]

Plaintiff is a corporation composed of about twenty firms and corporations who organized for the purpose of manufacturing and selling float spring-tooth harrows. Each firm assigned to said corporation, the National Harrow Company, its patents on harrows, and received

stock in exchange. Licenses were issued for these manufacturers to make the same kind of harrows as they had previously made, but the corporation fixed the price at which they should be sold, the right being reserved by the corporation to reduce such prices.

The appeal is from the judgment of the supreme court in favor of plaintiff.

Held, Contrary to public policy and void. Defendant not estopped by his contract from questioning its validity.

Contrary to chapter 384, New York laws of 1897, which is an act forbidding the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life.

[*American Fire Insurance Company et al.* v. *State*, 22 So. Rep., 99. Supreme court of Mississippi, May 24, 1897.]

Combinations to fix fire-insurance rates are within the prohibition by Mississippi Code, 1892, section 4437, of any trust or combine to place the control of "business" or its products or earnings in the hands of trustees.

[*Cummings* v. *Union Blue Stone Company*, 15 App. Div. (N. Y.). Appellate division, supreme court of New York, second department, April Term, 1897.]

A contract between the Union Blue Stone Company and a large portion of the wholesale dealers in blue stone along the Hudson River for the purpose of controlling that trade in New York city is void as being in restraint of trade.

[*People* v. *American Tobacco Company* (Ill. C. C.), 2 Chi. L. J., Wkly., 249.]

A combination by 95 per cent of the manufacturers and sellers of paper cigarettes consumed in the United States, to enable them to unite their respective interests under one governing body to limit the production, main-

tain prices, and destroy competition, is a commercial trust within the Illinois act of June 20, 1893.

[*People* v. *Duke*, 44 N. Y. Sup., 336. Court of general sessions, New York County, January, 1897.]

Defendants were officers and agents of a corporation called the American Tobacco Company, and sought to monopolize the business of making and vending cigarettes throughout the United States, and to unlawfully raise the price of such cigarettes.

Held, Within the prohibition against restraint of trade upon the grounds of public policy. Such monopoly need not be on the necessaries of life. Character of the trade to be monopolized is of no concern so long as it be a lawful one.

[*The Lufkin Rule Company* v. *Xavier Fringeli et al.* Supreme court of Ohio. No. 4913. Error to the circuit court of Cuyahoga County.]

SYLLABUS.

MINSHALL, J.

1. All agreements in general restraint of trade are against public policy and void; but agreements having such partial effect only, made in connection with the purchase of a business and its good will, shown to be reasonably necessary to the enjoyment of the good will of the business purchased, and not oppressive, may be enforced.

2. Where one engaged in the same business as another purchases that of the latter with its good will, and takes from the latter a stipulation that he will not directly nor indirectly engage in the same business in the State nor in the United States for the period of twenty-five years, such agreement necessarily tends to create a monopoly; and whether necessary or not to the reasonable enjoyment of the good will so purchased, the interest of the

public in the nonenforcement of such an agreement outweighs the interest of the purchaser in its enforcement, and is void.

3. Such an agreement is not divisible, for the reason that if restrained to the limits of the State, still such restraint would be general in its nature, and obnoxious to all the objections that exist against a general restraint of trade.

Judgment affirmed.

Decided February 1, 1898.

55th Congress, 2d Session. } SENATE. { No. 133.

No. 344. 84.
Appt. to Sup. of City. Gen. for Appr.

JOINT TRAFFIC ASSOCIATION.

LETTER

Filed Feb 23, 1898.

FROM

THE INTERSTATE COMMERCE COMMISSION,

TRANSMITTING,

IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 7, 1898, SO MUCH OF THE TESTIMONY TAKEN BY THE COMMISSION IN THE PROCEEDINGS KNOWN AS THE NEW YORK PRODUCE EXCHANGE CASE AND THE GRAIN INVESTIGATION CASES OF 1897 AS RELATES TO THE JOINT TRAFFIC ASSOCIATION AGREEMENT AND ANY ACTION THEREUNDER IN THE POOLING TRAFFIC OR OTHERWISE.

FEBRUARY 11, 1898.—Referred to the Committee on Interstate Commerce and ordered to be printed.

INTERSTATE COMMERCE COMMISSION,
Washington, February 10, 1898.

The President of the Senate:

In compliance with the resolution of the Senate of February 7, 1898, "so much of the testimony taken by the commission in the proceedings known as the New York Produce Exchange case and the grain investigation cases of 1897 as relates to the Joint Traffic Association agreement and any action thereunder in the pooling of traffic or otherwise" is hereby transmitted.

Respectfully,

MARTIN A. KNAPP,
Chairman.

INVESTIGATION OF RATES ON GRAIN AND GRAIN PRODUCTS TO ATLANTIC SEAPORTS.

The attention of the commission having been called to alleged violations of the act to regulate commerce by common carriers subject to the act in transporting grain and grain products from Chicago and points in Illinois taking Chicago rates to the Atlantic seaports, between January 1 and March 15, 1897, the commission issued an order requiring the railroad companies participating in such transportation to make answer thereto. Subsequently hearings were had thereunder, and the

testimony of officers of some of the railroad companies parties to the joint traffic agreement was taken. A transcript of such of it as referred to the joint traffic agreement, or to the operation thereof, is herewith certified.

JAMES L. CLARK, a witness on behalf of the commission, being duly sworn, testified as follows:

Mr. DAY. Please give your name.

Mr. CLARK. James L. Clark.

Mr. DAY. Occupation.

Mr. CLARK. General Western freight agent Lake Shore and Michigan Southern Railway.

Mr. DAY. How long have you been connected with the Lake Shore road at this point?

Mr. CLARK. Twenty-five years.

Mr. DAY. What is the course of traffic moving from your road to the Baltimore and Ohio or from the Baltimore and Ohio to your road at this point?

Mr. CLARK. Via South Chicago.

Commissioner PROUTY. What is his connection with the road?

Mr. CLARK. General Western freight agent.

Commissioner PROUTY. The gentleman who makes the contracts?

Mr. DAY. Traffic moving from the Baltimore and Ohio road—is it reached by the Baltimore and Ohio rails?

Mr. CLARK. Comes by the Belt Line to South Chicago.

Mr. DAY. Who furnished the motive power for the transfer?

Mr. CLARK. I could not say.

Mr. DAY. Don't know whether the Baltimore and Ohio does it or your road or the Belt Line?

Mr. CLARK. No, sir.

Mr. DAY. Who is there in your employ that would be able to testify upon that point?

Mr. CLARK. I could ascertain and inform you. I could ascertain for you.

Mr. DAY. You have no subordinate who is familiar with your physical transfer of property from your road to the other road?

Mr. CLARK. Well, I know, as a rule, myself, but I could not tell you what engine does it.

Mr. DAY. I didn't ask you what engine. I asked you which company furnished the power—whether it was done by the Lake Shore, when the transfer was effected, or whether it was done by the Baltimore and Ohio or the Belt Line?

Mr. CLARK. No; I could not say.

Mr. DAY. You can not even give me the name of one of your subordinates who does know?

Mr. CLARK. Our local agent at South Chicago would know.

Mr. DAY. What is his name?

Mr. CLARK. Mr. Frank Stewart.

Mr. DAY. He lives at Chicago?

Mr. CLARK. Yes, sir.

Mr. DAY. Do you know his address?

Mr. CLARK. South Chicago.

Mr. DAY. Do you know his number?

Mr. CLARK. I could not tell you.

Mr. DAY. What elevators are there on the Lake Shore road, or that are owned or controlled by the Lake Shore Company?

Mr. CLARK. None.

Mr. DAY. Are there any elevators standing on the right of way or the property of the Lake Shore Company?

Mr. CLARK. Yes, sir.

Mr. DAY. Where?

Mr. CLARK. Englewood.

Mr. DAY. Who operates that elevator?

Mr. CLARK. The Lake Shore Transfer Company.

Mr. DAY. What grain firm is directly operating that elevator?

Mr. CLARK. It is for the use of all the grain people of Chicago.

Mr. DAY. Public elevator?

Mr. CLARK. Yes, sir.

Mr. DAY. Is it not operated by some other concern than the Lake Shore Transfer Company?

Mr. CLARK. Yes, sir.

Mr. DAY. Who?

Mr. CLARK. Lasier & Hooper.

Mr. DAY. Are there any other elevators that are on the right of way?

Mr. CLARK. No, sir.

Mr. DAY. Do you know anything about the lease from the Lake Shore road to the Lake Shore Transfer Company?

Mr. CLARK. I think you have a copy of the contract.

Mr. DAY. I ask you if you are familiar with it?

Mr. CLARK. Yes; I have read it. I could not recite the contents of it.

Mr. DAY. How are you advised that Lasier & Hooper operate that elevator? You say it was leased to the Lake Shore Transfer Company?

Mr. CLARK. Yes, sir.

Mr. DAY. You understand that the Lake Shore Transfer Company has leased to Lasier & Hooper?

Mr. CLARK. No, sir.

Mr. DAY. What is your understanding in respect to that?

Mr. CLARK. They handle the business of the elevator—that is, Lasier & Hooper.

Mr. DAY. Isn't it handled by the company to whom your company leased it?

Mr. CLARK. The Lake Shore Company has nothing to do with it—the Lake Shore Railroad.

Mr. DAY. Nor has the Lake Shore Transfer Company?

Mr. CLARK. Yes, sir; the Lake Shore Transfer Company are the people who own the elevator.

Mr. DAY. They don't operate it?

Mr. CLARK. Yes, they operate it, if you please; but Lasier & Hooper are the ones that manage it.

Mr. DAY. The Lake Shore Transfer Company operate it?

Mr. CLARK. Yes.

Mr. DAY. But Lasier & Hooper manage it?

Mr. CLARK. Yes, sir.

Mr. DAY. That is your understanding?

Mr. CLARK. Yes, sir.

Mr. DAY. Lasier & Hooper are grain merchants?

Mr. CLARK. Yes, sir.

Mr. DAY. They ship constantly over your road, do they not—largely?

Mr. CLARK. Yes, sir.

Mr. DAY. Does your company pay them, or that elevator concern, anything for transfer charges—for transferring grain?

Mr. CLARK. Yes, sir.

Mr. DAY. What do you pay them?

Mr. CLARK. We pay them as provided for by the joint committee rules.

Mr. DAY. I asked you what you paid them?

Mr. CLARK. Oh, what sum; $1.50 a car.

Mr. DAY. For all grain?

Mr. CLARK. For all grain.

Mr. DAY. You pay them all for that grain alike—paid by the car, not by weight?

Mr. CLARK. By the car.

Mr. DAY. Is it the car in or is it the car out?

Mr. CLARK. It is the car out.

Mr. DAY. Then, if two cars come in, weighing 30,000 to 40,000 pounds each, and they are turned into one car, you pay them $1.50; is that right?

Mr. CLARK. That is right.

Mr. DAY. Is any allowance made by your company to Lasier & Hooper on any other account?

Mr. CLARK. No, sir.

Mr. DAY. And in no other form?

Mr. CLARK. No, sir.

Mr. DAY. Directly or indirectly?

Mr. CLARK. In no other way, sir.

Mr. DAY. For any service?

Mr. CLARK. For any service.

Mr. DAY. What does your company charge Lasier & Hooper for delivering grain to that elevator?

Mr. CLARK. We make no charge.

Mr. DAY. What do you charge them for carrying it away?

Mr. CLARK. We do it ourselves.

Mr. DAY. No charges made?

Mr. CLARK. No charges made.

Mr. DAY. Nothing is imposed upon the traffic—no burden for carrying the car to the elevator or taking it away?

Mr. CLARK. No, sir.

Mr. DAY. You make any charge when the claim comes from another road for shunting into that elevator?

Mr. CLARK. You mean Eastern railroad?

Mr. DAY. Well, Western or Eastern.

Mr. CLARK. We make no charge for taking care of the business to and from the elevator.

Mr. DAY. Under any circumstances?

Mr. CLARK. Unless it might be shipped by another Eastern railroad. In that case we impose $3 per car charge.

Mr. DAY. But you do it in that instance?

Mr. CLARK. Yes; in that instance only.

Mr. DAY. No other charge is made for switching cars of grain to or from the elevator, excepting in the single instance, or in the case where grain is to be transported east over some other line than yours—than the Lake Shore and Michigan Southern?

Mr. CLARK. The Lake Shore and Michigan Southern.

Mr. DAY. Do you have anything to do with the performance or carrying into effect of the contract between the Lake Shore and Michigan Southern and the Lake Shore Transfer Company?

Mr. CLARK. No, sir.

Mr. DAY. You do not know, then, whether any excess of the $3 a car

or the $3 per car is imposed against Lasier & Hooper in any other case than the one you have named?

Mr. CLARK. I think I would know it if it was done.

Mr. DAY. Do you have anything to do with the settlement between the Lake Shore and Michigan Southern and the Lake Shore Transfer Company?

Mr. CLARK. Yes, sir.

Mr. DAY. You audit the settlement?

Mr. CLARK. Yes, sir; the bills are filed with me.

Mr. DAY. They are filed with you?

Mr. CLARK. Yes, sir.

Mr. DAY. All their claims against your company for transfer service are filed with you?

Mr. CLARK. Yes, sir.

Mr. DAY. And the claims of your company against them, for transferring of grain or for switching it, pass through your hands too?

Mr. CLARK. Let me understand your question.

Mr. DAY. You say that the claims of Lasier & Hooper or the Lake Shore Transfer Company against the Lake Shore and Michigan Southern Railroad Company for transferring grain are filed with you?

Mr. CLARK. Yes, sir.

Mr. DAY. I ask you if the claims of your company—the railroad company—against the transfer company for the $3 per car for switching also pass through your hands?

Mr. CLARK. No, sir; it does not.

Mr. DAY. Through whose hands do those claims pass?

Mr. CLARK. Pass through our local department.

Mr. DAY. Who is the individual who has jurisdiction of those matters?

Mr. CLARK. Mr. C. H. Clauson, local agent of the railroad company.

Mr. DAY. Where is his office?

Mr. CLARK. Twelfth street and Pacific avenue.

Mr. DAY. He is the local agent of the railroad company?

Mr. CLARK. Yes, sir.

Mr. DAY. Oh, whom do you settle with—Lasier & Hooper or the Lake Shore Transfer Company?

Mr. CLARK. The Lake Shore Transfer Company.

Mr. DAY. They are represented by Lasier & Hooper—that company—in this settlement?

Mr. CLARK. No, sir; the vouchers are signed by the Lake Shore Transfer Company.

Mr. DAY. Whom do you pay the money to?

Mr. CLARK. I don't pay the claims myself. They are paid by the Lake Shore Transfer Company.

Mr. DAY. Whom do you deal with; what individual?

Mr. CLARK. Of the Lake Shore Transfer Company?

Mr. DAY. Yes.

Mr. CLARK. His name is Wellman, I think. I am not sure. I think that is his name.

Mr. DAY. Can you give his initials?

Mr. CLARK. No; I could not.

Mr. DAY. He is a clerk for Lasier & Hooper?

Mr. CLARK. He is a clerk for the Lake Shore Transfer Company.

Mr. DAY. He is an employee of Lasier & Hooper?

Mr. CLARK. He might be considered so.

Mr. DAY. How would you consider it?

Mr. CLARK. I should consider it so.

Mr. DAY. Why didn't you say so first? You adjust those claims and on your adjustment a check is drawn in their favor, or a draft?

Mr. CLARK. Yes, sir; a check.

Mr. DAY. Who issues the check?

Mr. CLARK. The treasurer of the Lake Shore Company; the Lake Shore Railroad Company.

Mr. DAY. Does he send it to them, or does it pass through your hands?

Mr. CLARK. It does not pass through my hands.

Mr. DAY. How often do you make settlement with Lasier & Hooper?

Mr. CLARK. The bills are rendered monthly.

Mr. DAY. You keep a book account with them?

Mr. CLARK. No, sir.

Mr. DAY. What do you do with the accounts represented by them?

Mr. CLARK. Send them to Cleveland.

Mr. DAY. To whom?

Mr. CLARK. W. T. Smith.

Mr. DAY. What is the title of his office.

Mr. CLARK. He is the claim agent of the Lake Shore Railroad at Cleveland.

Mr. DAY. After you have prepared it you send it to Smith. When Smith approves it what becomes of the claim?

Mr. CLARK. The claim has to have the approval of Mr. Paul Rayner, the chief clerk of the joint-rate committee.

Mr. DAY. What is his position now?

Mr. CLARK. He is the chief inspector.

Mr. DAY. Of the Central Traffic Association at Chicago?

Mr. CLARK. Yes, sir.

Mr. DAY. How long has he been occupying that position?

Mr. CLARK. Many years.

Mr. DAY. He approves it as inspector?

Mr. CLARK. Yes, sir.

Mr. DAY. Does he have supervision over all the cars that are transferred from the Lake Shore Transfer Company to your road?

Mr. CLARK. Yes, sir.

Mr. DAY. And other roads?

Mr. CLARK. And other roads.

Mr. DAY. He keeps a record?

Mr. CLARK. Yes, sir.

Mr. DAY. After you approve of it, it has to be approved by Mr. Rayner?

Mr. CLARK. Yes, sir.

Mr. DAY. And then it goes to Mr. Smith, at Cleveland?

Mr. CLARK. Yes, sir.

Mr. DAY. And then from Mr. Smith where does it go?

Mr. CLARK. It has to be approved by the officials of the road, and thence to the treasurer for payment.

Mr. DAY. What is the capacity of this elevator?

Mr. CLARK. They can transfer about—working night and day—probably 120 cars.

Mr. DAY. What is its storage capacity?

Mr. CLARK. I could not say.

Mr. DAY. Can you give an approximate notion?

Mr. CLARK. I should imagine that it was 30,000 or 40,000 bushels.

Mr. DAY. Now, what other elevator is there on your right of way?

Mr. CLARK. There is no other elevator.
Mr. DAY. What other elevator do your rails extend to?
Mr. CLARK. No other.
Mr. DAY. The Chicago-O'Neill Grain Company?
Mr. CLARK. No, sir.
Mr. DAY. Have you examined the exhibit of your company filed with the commission?
Mr. CLARK. Yes, sir.
Mr. DAY. Was it drafted under your supervision?
Mr. CLARK. Yes, sir.
Mr. DAY. Will you explain to the commission why it was, in February—the last week of February—and the first week of March of this year, your company turned over to the Nickel Plate a large volume of grain and grain products—volume of traffic?
Mr. CLARK. Yes, sir.
Mr. DAY. Well, please do so.
Mr. CLARK. Because we were ahead of our allotment; it was to help the Nickel Plate.
Mr. DAY. Ahead of what allotment?
Mr. CLARK. The allotment that was agreed to by our company and other companies.
Mr. DAY. Who agreed to it? How do you know it was agreed to by your company? Who represented your company?
Mr. CLARK. I could not say.
Mr. DAY. Where was the agreement made?
Mr. CLARK. I could not give you that information.
Mr. DAY. When was it made?
Mr. CLARK. I could not give you the date.
Mr. DAY. How long ago, approximately?
Mr. CLARK. I would not dare state.
Mr. DAY. A year?
Mr. CLARK. Possibly. Yes, sir: a year, I think.
Mr. DAY. Made when the Joint Traffic Association effected its agreement, or subsequent to that?
Mr. CLARK. Yes, sir.
Mr. DAY. Who had charge of this traffic here?
Mr. CLARK. It was under my charge.
Mr. DAY. You remember the circumstances to which I refer?
Mr. CLARK. Yes, sir.
Mr. DAY. You directed that to be made, did you?
Mr. CLARK. Yes, sir.
Mr. DAY. How could you tell whether they are entitled to that under your agreement—under the agreement?
Mr. CLARK. We had statistics to exhibit that.
Mr. DAY. What percentage of the traffic were they entitled to out of Chicago—the Nickel Plate?
Mr. CLARK. The Nickel Plate?
Mr. DAY. Yes, sir.
Mr. CLARK. I can not just recall their percentage. I could not tell you what it is, in my mind.
Mr. DAY. What percentage was your road entitled to?
Mr. CLARK. 14.2 per cent.
Mr. DAY. What was the Pennsylvania entitled to?
Mr. CLARK. I would not dare say.
Mr. DAY. Approximately?
Mr. CLARK. I think it was 14.

Mr. DAY. The Michigan Central?
Mr. CLARK. 13.6.
Mr. DAY. The Pennsylvania, you say, about 14?
Mr. CLARK. Which company? There are two.
Mr. DAY. The whole outfit.
Mr. CLARK. More than that, would be the Fort Wayne.
Mr. DAY. The Fort Wayne?
Mr. CLARK. Yes, sir.
Mr. DAY. And the Panhandle, the Pittsburg, Cincinnati and St. Louis?
Mr. CLARK. I don't remember how much that is.
Mr. DAY. What approximation can you give? Have you any idea?
Mr. CLARK. No, sir.
Mr. DAY. What was the Baltimore and Ohio percentage?
Mr. CLARK. I could not say.
Mr. DAY. Can you give an approximate idea?
Mr. CLARK. That is all on record. I would not like to say.
Mr. DAY. Have you a copy of it?
Mr. CLARK. Yes, sir.
Mr. DAY. A copy of the agreement?
Mr. CLARK. I have a copy of these per cents.
Mr. DAY. Where did you get it? Is it official?
Mr. CLARK. I could not say whether it is official or not; it is on file.
Mr. DAY. You received it, and you are acting under it. It is official, then?
Mr. CLARK. Yes, sir.
Mr. DAY. From whom did you receive it?
Mr. CLARK. It is published by the association.
Mr. DAY. What association?
Mr. CLARK. By the Central Freight Association?
Mr. DAY. By the Central Freight Association?
Mr. CLARK. Yes, sir; I feel sure.
Mr. DAY. From whom did you receive this percentage agreement?
Mr. CLARK. I could not tell.
Mr. DAY. Would you get a paper from your company without knowing the source from which you received it?
Mr. CLARK. No, sir?
Mr. DAY. Tell the commission from whom you received it?
Mr. CLARK. I could not give you that information.
Mr. DAY. Where is the paper?
Mr. CLARK. It is filed, I think, in our office.
Mr. DAY. In your office? Will you produce it to-morrow morning?
Mr. CLARK. Yes, sir.
Mr. DAY. Will you also bring along the record showing the percentages that each of the lines running east was entitled to?
Mr. CLARK. Yes, sir.
Mr. DAY. And what on the 27th of February, and from then to the 8th of March, inclusive, the Nickel Plate was short of traffic under that agreement and what your road was over?
Mr. CLARK. What date was that?
Mr. DAY. Commencing February 27, down to and including March 8. You say you remember this particular instance, Mr. Clark. Who did you direct to turn this traffic over to the Baltimore and Ohio?
Mr. CLARK. Our local agent.
Mr. DAY. Where did he turn it over—where was it turned over—at what point?

Mr. CLARK. At Englewood.
Mr. DAY. Is that what you call South Chicago?
Mr. CLARK. No, sir.
Mr. DAY. You connect with the Baltimore and Ohio at Englewood?
Mr. CLARK. Connect with the Nickel Plate at Englewood.
Mr. DAY. There are no transfer rails there?
Mr. CLARK. They don't intersect there; they come to that point after traffic.
Mr. DAY. From whose rails?
Mr. CLARK. From our rails.
Mr. DAY. Where do they come from to strike your rails? Where do they strike your rails?
Mr. CLARK. At Grand Crossing.
Mr. DAY. Then they come out on your rails from Grand Crossing to Kensington?
Mr. CLARK. No.
Mr. DAY. Describe it.
Mr. CLARK. They come to Englewood and take traffic from us at that point, and their own rails commence at Grand Crossing.
Mr. DAY. They go over your rails for about 5 miles?
Mr. CLARK. Not that far.
Mr. DAY. What is the distance?
Mr. CLARK. About 4 miles, possibly.
Mr. DAY. They come after this traffic—they send their engine?
Mr. CLARK. Yes, sir.
Mr. DAY. How would they be notified that the traffic was ready for them?
Mr. CLARK. By our local agent.
Mr. DAY. Did you indicate how that traffic was to be disposed of after it reached the end of the rails of the Nickel Plate?
Mr. CLARK. Yes, sir.
Mr. DAY. How?
Mr. CLARK. It should take the same connecting Eastern line as if it had gone via the Lake Shore.
Mr. DAY. You remember what it was in that instance—you remember in that particular instance?
Mr. CLARK. It was probably many cars of traffic going to different points.
Mr. DAY. But these all seem to have gone by the same route.
Mr. CLARK. Do they?
Mr. DAY. Look at that [showing witness paper].
Mr. CLARK. Yes, sir.
Mr. DAY. Have you got it there? It is the New York Central.
Mr. CLARK. The New York Central; yes, sir.
Mr. DAY. Now, I find that you turned over about the same time, or on the 26th and 27th of February——
Mr. CLARK. 26th and 27th?
Mr. DAY. 26th and 27th of February you turned over about 150 cars of freight to the Baltimore and Ohio.
Mr. CLARK. No; I don't recall that, sir.
Mr. DAY. Don't remember that at all?
Mr. CLARK. That we turned any freight to them.
Mr. DAY. No; the Baltimore and Ohio turned it over to you.
Mr. CLARK. No.
Mr. DAY. You are right; that is another road. Your road has nothing to do with that. I was in error.

Mr. CLARK. Yes, sir.

Mr. DAY. I find between the 1st and the 6th of March you turned over a considerable volume of business, chiefly oats, to the Nickel Plate.

Mr. CLARK. Yes, sir.

Mr. DAY. It was all of the same kind—they were simply behind and you were evening up?

Mr. CLARK. Yes, sir.

Mr. DAY. Was that the general practice at Chicago during that period of time?

Mr. CLARK. Yes, sir.

Mr. DAY. Were these percentages generally adhered to?

Mr. CLARK. We were trying to.

Mr. DAY. The purpose was to divide the traffic according to the fixed percentages agreed upon by some railroad associations?

Mr. CLARK. Yes, sir.

Mr. DAY. Do you know a concern, a very large shipper, known as the P. W. F. M. & Co.?

Mr. CLARK. The Pittsburg, Fort Wayne and Chicago?

Mr. DAY. This is a shipper—the P. W. F. M. Co.

Mr. CLARK. Is it Bartlett, Frazier & Co.?

Mr. DAY. Do you know a concern at Toledo—Reynolds Bros.?

Mr. CLARK. I know of them; yes, sir.

Mr. DAY. Do you have any business relations with them?

Mr. CLARK. No, sir.

Mr. DAY. Directly or indirectly?

Mr. CLARK. None whatever.

Mr. DAY. Commencing about January 1, and running through the month of January, a very large shipment of corn by the Harris Company is shown. Did you have anything to do at all with securing that traffic?

Mr. CLARK. No, sir.

Mr. DAY. You had nothing whatever to do with it?

Mr. CLARK. No, sir.

Mr. DAY. Directly or indirectly?

Mr. CLARK. Directly or indirectly.

Mr. DAY. Or with fixing a rate or naming a rate?

Mr. CLARK. No, sir.

Mr. DAY. Or anything to do with collecting the charges—the transportation charges?

Mr. CLARK. No, sir.

Mr. DAY. Or dividing?

Mr. CLARK. No, sir.

Mr. DAY. Or routing the traffic?

Mr. CLARK. No, sir.

Mr. DAY. Who made the contract for that traffic?

Mr. CLARK. I could not tell you, sir.

Mr. DAY. Who is your immediate superior, Mr. Clark?

Mr. CLARK. Mr. G. J. Grammer.

Mr. DAY. He is the general freight agent?

Mr. CLARK. The general traffic manager.

Mr. DAY. When you receive instructions respecting a routing of freight or rates on traffic, from whom do you get them?

Mr. CLARK. The rates are made by the association.

Mr. DAY. I asked you from whom you get the instructions?

Mr. CLARK. We get the instructions from the association.

Mr. DAY. What association?

Mr. CLARK. The Central Freight Association.

Mr. DAY. Is the Lake Shore and Michigan Southern in the Central Freight Association?

Mr. CLARK. Yes, sir.

Mr. DAY. The Central Freight Association makes the rate to the trunk-line territory?

Mr. CLARK. Approved by the trunk lines.

Mr. DAY. They are approved by the trunk lines?

Mr. CLARK. Yes, sir.

Mr. DAY. Rates from here to the seaboard are made by the Central Freight Association, subject to the approval of the Trunk Line Association?

Mr. CLARK. Yes, sir.

Mr. DAY. When you receive instructions respecting traffic, the securing of traffic, or in making of contracts for traffic for transportation over your line, from whom do you get your instructions?

Mr. CLARK. I would not get any instructions.

Mr. DAY. You have carte blanche to go in and represent the company?

Mr. CLARK. I represent the company in that respect.

Mr. DAY. Do you have any superior in that respect, who exercises supervision over your work?

Mr. CLARK. No, sir.

Mr. DAY. To whom do you report?

Mr. CLARK. To Mr. G. J. Grammer.

Mr. DAY. If you should on any account, whether it was legal or illegal, make a concession, carry traffic for the export rate or as through traffic when it turned out to be local—carried at through rate when it was in fact local traffic, would you make a report of your transactions?

Mr. CLARK. I would not make such an arrangement.

Mr. DAY. You never have made such an arrangement? You have never made any concession in rates?

Mr. CLARK. No, sir.

Mr. DAY. You never contracted for traffic below the published tariff rates?

Mr. CLARK. No, sir.

Mr. DAY. Never?

Mr. CLARK. Covered by this inquiry?

Mr. DAY. I am asking you generally. I am not asking you about the 1st of January. During the past three years?

Mr. CLARK. I will have to ask my counsel about that.

Mr. DAY. You will have to ask your counsel whether you did it?

Mr. CLARK (after consultation with counsel). I have before the 1st of January.

Mr. DAY. In those instances, to whom did you make report of what you did?

Mr. CLARK. My superior, Mr. G. J. Grammer.

Mr. DAY. That is what I wanted to know. When you routed this traffic, took the traffic from your own line and turned it over to a competing line, to whom did you report that transaction?

Mr. CLARK. Mr. G. J. Grammer.

Mr. DAY. How many clerks have you in your employ in Chicago?

Mr. CLARK. There are seven or eight clerks in my immediate office; something like that.

Mr. DAY. Do you keep a copy of your correspondence?

Mr. CLARK. Yes, sir.

Mr. DAY. Will you produce to the commission the correspondence

which you had with Mr. Grammer or the letters which you wrote to Mr. Grammer respecting the turning over of this traffic to the Nickel Plate road in February and March?

Mr. CLARK. Yes, sir.

Mr. DAY. Who participated in the making up of this report to the commission?

Mr. CLARK. Our local department; our local agent.

Mr. DAY. What do you say his name is?

Mr. CLARK. C. H. Clauson.

Mr. DAY. Who else?

Mr. CLARK. His help; I could not give the names.

Mr. DAY. Did your auditor or the officer who subscribed to the affidavit examine it?

Mr. CLARK. I could not say.

Mr. DAY. He did not in your presence?

Mr. CLARK. No, sir.

Mr. DAY. I do not find in this report, Mr. Clark, any mention of the traffic you turned over to competing carriers during this period of time.

Mr. CLARK. I do not think it is included. The traffic included in that is such as passed over our rails only.

Mr. DAY. You mean from one end of the Lake Shore to the other—from Chicago to the trunk-line territory?

Mr. CLARK. Yes, sir.

Mr. DAY. You were asked to name the connecting carriers, rail or water, switching or transfer line, to which you delivered the traffic, but that which you turned over to your competitors is not mentioned. Did you turn over on behalf of the Lake Shore road any other traffic between January 1 and the 15th of March than that which I have especially called your attention to?

Mr. CLARK. I think not.

Mr. DAY. Will you examine the records of your office and ascertain and make report to the commission to-morrow how that is?

Mr. CLARK. From February 1 to March 8—then there was another date there.

Mr. DAY. I was, I think, within that period. It was a different lot. Now, I will ask you to examine your records and make report to the commission to-morrow of other traffic that you turned over or caused to be turned over to a competing line. Have you any information respecting the terms under which this traffic—this Harris traffic—was carried?

Mr. CLARK. No, sir.

Mr. DAY. You have no information at all?

Mr. CLARK. Other than it paid tariff rates.

Mr. DAY. How do you know that it paid tariff rates?

Mr. CLARK. It is charged that way.

Mr. DAY. It is charged that way on the papers; that is the only information you have on the subject?

Mr. CLARK. If there were reductions I presume I would know of it.

Mr. DAY. Who would have informed you?

Mr. CLARK. It would have been done through me, probably.

Mr. DAY. Do you wish to be understood that so far as you have any information this 400 or 500 cars of corn——

Mr. CLARK. I do not think there is that much.

Mr. DAY. It is pretty close on to it.

Mr. CLARK. Five hundred cars?

Mr. DAY. Several hundred cars. You examined the report commencing January 2?

Mr. CLARK. I do not think there were 200 cars of it.

Mr. DAY. Yes, sir; there are all of 200—more than 200. Do you wish to be understood as stating that in respect to that traffic that it paid the full published tariff rates?

Mr. CLARK. Yes, sir.

Mr. DAY. Without any reduction, rebate, directly or indirectly, made in respect to it?

Mr. CLARK. Yes, sir.

Mr. DAY. The full tariff was collected and retained?

Mr. CLARK. Yes, sir.

Mr. DAY. And neither by direction or indirection was any of it paid back or remitted?

Mr. CLARK. No, sir.

Mr. DAY. On any account whatever, so far as you know or have any information?

Mr. CLARK. Yes, sir.

Mr. DAY. Do you know whose traffic that was?

Mr. CLARK. No, sir; unless it is expressed there.

Mr. DAY. You do not know whether, in fact, that was the traffic of Armour & Co.?

Mr. CLARK. I do not.

Mr. DAY. Or Counselman?

Mr. CLARK. I only know what the record reads, from reference to it.

Mr. DAY. Have you had any business relations by or on behalf of Armour or Counselman or Reynolds Bros. in the past five months?

Mr. CLARK. No, sir.

Mr. DAY. Acting in your capacity as agent of the Lake Shore Road?

Mr. CLARK. No, sir.

Mr. DAY. How did this traffic go—by one of the fast freight lines?

Mr. CLARK. Yes, sir.

Mr. DAY. Or was it ordinary traffic?

Mr. CLARK. It went by the Red Line.

Mr. DAY. Who is the agent of the Red Line?

Mr. CLARK. Here?

Mr. DAY. Yes, sir.

Mr. CLARK. Mr. Duke Nicholson.

Mr. DAY. Is he one of your employees?

Mr. CLARK. He is a line agent and under direction of my office, I think, as regards this traffic.

Mr. DAY. What is his name?

Mr. CLARK. Duke Nicholson.

Mr. DAY. Do you know F. W. Fowkes?

Mr. CLARK. No, sir.

Mr. DAY. Do you know where his place of business is?

Mr. CLARK. No, sir.

Mr. DAY. Have you had any business relations with him?

Mr. CLARK. No, sir.

Mr. DAY. You do not know who he is?

Mr. CLARK. I do not know such a gentleman.

Mr. DAY. Have you had any relations with Hancock & Co.?

Mr. CLARK. No, sir.

Mr. DAY. Or any of their agents or anybody representing them?

Mr. CLARK. No, sir.

Mr. DAY. There is a considerable traffic here carried to the order of Noble Jones without any consignor being mentioned. Could not you give the consignor?

Mr. CLARK. Does not the statement state it?

Mr. DAY. No.

Mr. CLARK. May I glance at it?

Mr. DAY. Yes, sir.

Mr. CLARK. (After referring to statement.) He was both the consignee and consignor.

Mr. DAY. Did you know, Mr. Clark, before this great shipment of corn consigned to Harris by Harris that your road was going to receive that traffic?

Mr. CLARK. I knew nothing of it.

Mr. DAY. You had no advance information?

Mr. CLARK. No, sir.

Mr. DAY. Here is that particular instance I spoke of of Noble Jones (referring to statement); it continues over through the next page.

Commissioner PROUTY. What port did that shipment go to, Mr. Day?

Mr. DAY. To New York.

Commissioner PROUTY. For export?

Mr. DAY. How was it, Mr. Clark; for export?

Mr. CLARK. So far as I know, for local delivery.

Mr. DAY. A large part of it appears to have been shipped out by your line after the export rate was put in?

Mr. CLARK. Then it was for export. I am judging from the rate. It was at 23 cents. It was both the local and export rate at that time.

Mr. DAY. They both took the same rate?

Mr. CLARK. Yes, sir.

Mr. DAY. When did you put in that rate?

Mr. CLARK. January 15, I think.

Mr. DAY. This appears to be carried at the 23-cent rate.

Mr. CLARK. That was the tariff at that time.

Mr. DAY. On January 16?

Mr. CLARK. It originated before the 15th. Does it not so state?

Mr. DAY. Did you permit of rebilling on your line at that time?

Mr. CLARK. It is consigned right through.

Mr. DAY. Did your line permit rebilling and reconsigning?

Mr. CLARK. Yes, sir.

Mr. DAY. The dates under the column asking the name of the connecting carrier, rail or water, switching or transfer line from which received and waybill reference, the number and date. You give the Chicago, Burlington and Quincy number and date. Is that the date it originated on the Mississippi River, or the date of your reception of it?

Mr. CLARK. The date of shipment from the Mississippi River.

Mr. DAY. That is the date of the Chicago, Burlington and Quincy waybill?

Mr. CLARK. Yes, sir.

Mr. DAY. Now, when this traffic came to your line, where did it come from? Where did you get it?

Mr. CLARK. It was delivered to us by the Chicago, Burlington and Quincy at Forty-third street.

Mr. DAY. In their cars?

Mr. CLARK. In their cars.

Mr. DAY. And you put it into your elevators?

Mr. CLARK. The traffic passed through our elevator into our cars.

Mr. DAY. What elevator?

Mr. CLARK. I should say the Lake Shore Transfer.

Mr. DAY. It is on your property?

Commissioner PROUTY. From what point was that 23-cent rate?

Mr. DAY. The Mississippi River, it appears here. The Harrises have a great elevator at Burlington, Iowa, and I assume it came from that elevator. Do you know, Mr. Clark, where the grain came from?

Mr. CLARK. I could not say.

Mr. DAY. It appears to be billed from Chicago, but the report here shows Mississippi River.

Commissioner PROUTY. What was the rate from the Mississippi River to New York at that time—23 cents?

Mr. DAY. What was the tariff, Mr. Clark, from Chicago to New York at that time?

Mr. CLARK. Twenty cents.

Commissioner PROUTY. What was the rate from the Mississippi River at that time?

Mr. CLARK. Twenty-three cents.

Commissioner PROUTY. Were the domestic and export rates the same at that time?

Mr. CLARK. Yes, sir.

Mr. DAY. They were during a part of this time, your honor. They were when the shipment had its origin.

Commissioner PROUTY. They were not the same when it was carried through, were they?

Mr. CLARK. If the billing says it was at the export rate, it went for export.

Commissioner PROUTY. I say, the export rate and the domestic rate were not the same the 1st of January, were they?

Mr. CLARK. Yes, sir.

Commissioner PROUTY. From Chicago to New York?

Mr. CLARK. Yes, sir.

Mr. DAY. When did the export drop under the domestic rate?

Mr. CLARK. I think January 15.

Commissioner PROUTY. Did that 23 cent rate from the Mississippi River to New York include transfer charges at Chicago?

Mr. CLARK. Yes, sir.

Commissioner PROUTY. That was the entire rate through that the shipper paid?

Mr. CLARK. Yes, sir.

Mr. DAY. Where did the Chicago, Burlington and Quincy turn this traffic over to you?

Mr. CLARK. It went to the St. Charles Air Line and they took it on our rails to Forty-third street, where we receipted for it?

Mr. DAY. What is the St. Charles Air Line?

Mr. CLARK. It is a connecting line that goes across at Sixteenth street.

Mr. DAY. What is the length of that line?

Mr. CLARK. A mile or so.

Mr. DAY. Is it more than a mile?

Mr. CLARK. I could not say.

Mr. DAY. What is the charge made by that line for transferring a car?

Mr. CLARK. I have not it in mind.

Mr. DAY. Can you approximate it?

Mr. CLARK. It is very small.

Mr. DAY. What company controls that line?

Mr. CLARK. I could not say.

Mr. DAY. Have you any information on the subject?

Mr. CLARK. I think jointly by several companies.

Mr. DAY. What companies?

Mr. CLARK. The Illinois Central, the Michigan Central—I am not sure of this.

Mr. DAY. What others?

Mr. CLARK. That is all, I think.

Mr. DAY. Just those two?

Mr. CLARK. I can not recall any more.

Mr. DAY. Now, this Harris traffic. It appears that a large quantity of this traffic was carried five days after the export rate went into effect, and yet it appears to be billed at the domestic rate from the Mississippi River to the Atlantic Seaboard. Was the billing in respect to that traffic ever corrected to conform to the export rate?

Mr. CLARK. No, sir; it is not exhibited there.

Mr. DAY. I asked you what the fact is, without reference to whether it is exhibited here or not. I asked whether the billing was ever corrected to conform to the export rate afterwards.

Mr. CLARK. No, sir.

Mr. DAY. Then that great shipment bore a rate of 5 cents a hundred pounds greater than the current rate at the time you were carrying the traffic?

Mr. CLARK. The originating point is the date that governs.

Mr. DAY. Did that govern in all the export traffic?

Mr. CLARK. Yes, sir.

Mr. DAY. Are you sure of that? You say it did. I find some of the exhibits here that bore the export rate on the 15th of January, and the traffic originated a week earlier than that. I want to know what you know about the fact. Do you know whether or not, on this Harris traffic, the billing was corrected to conform to the export rate? I think that is the railroad phrase, "correcting," where it is reconsigned or the rate is changed en route?

Mr. CLARK. Yes, sir.

Mr. DAY. Did you have any information as to whether that was subsequently corrected to bear the export rate instead of the domestic?

Mr. CLARK. I could not say.

Mr. DAY. You have no information on the subject at all?

Mr. CLARK. No, sir.

Mr. DAY. You have not been informed at all?

Mr. CLARK. No, sir.

Mr. DAY. Here is some of the Harris traffic—some of it that is going at an export rate. (Referring to statement.) It started on its journey on the Chicago, Burlington and Quincy on the 22d day of January (December?), nearly thirty days before the export rate was put into effect. I would like to ask you, Mr. Clark, if traffic comes in from Mississippi River and is reconsigned on your road, what length of time, within what time limit, must it be reconsigned before you permit it to be rebilled? Say, traffic that came from the Chicago, Burlington and Quincy, within what time limit must it be reconsigned to conform to your rules?

Mr. CLARK. Seventy-two hours.

Mr. DAY. Are you aware of any instance in which traffic remained more than seventy-two hours and was then reconsigned?

Mr. CLARK. No, sir.

Mr. DAY. You have no information on that subject?

Mr. CLARK. No, sir.

Mr. DAY. If traffic had remained here a week, would you be advised of that? How would you be informed as to the length of time traffic had been there?

Mr. CLARK. Disregarding the rules, it would remain longer than that.

Mr. DAY. I understood that was a rule of the joint traffic association?

Mr. CLARK. Yes, sir.

Mr. DAY. I ask whether you have permitted traffic to be reconsigned at Chicago for transit over your road where it had been in Chicago for a longer period than seventy-two hours?

Mr. CLARK. I think not.

Mr. DAY. What evidence do you have that traffic is to be exported? What evidence do you require to permit traffic to go at 5 cents per 100 pounds lower rate than you charge generally to the shipper?

Mr. CLARK. If a foreign bill of lading is not issued here for it we require that it shall be billed to the care of a foreign freight agent at the seashore.

Mr. DAY. And if a foreign bill of lading is issued here?

Mr. CLARK. That settles it.

Mr. DAY. That settles it?

Mr. CLARK. Yes, sir.

Mr. DAY. Is there anything in the limitations imposed by the companies which you represent that prevents that bill of lading being transferred en route?

Mr. CLARK. It could not be.

Mr. DAY. Why not?

Mr. CLARK. You mean the foreign bill of lading?

Mr. DAY. Yes, sir.

Mr. CLARK. The bill of lading is issued on a bona fide contract with the steamship company and the ship's papers are sent directly to the seaboard for delivery to the steamship company. That seems to cover it.

Mr. DAY. Do you mean to say that the bill of lading that you require must be issued here by the agent of a steamship company?

Mr. CLARK. No; we issue a foreign bill of lading in connection with the steamship lines.

Mr. DAY. May that traffic not be entitled to be changed between here and New York? Is not the bill of lading assignable, negotiable?

Mr. CLARK. I do not think it is possible to have it changed.

Mr. DAY. Do not the joint traffic rules permit of reconsignment in the Trunk Line territory where the traffic takes a greater rate than 100 per cent of the Chicago rate?

Mr. CLARK. This export grain?

Mr. DAY. Any grain, without limit.

Mr. CLARK. It is proper to make one change on grain in transit.

Mr. DAY. As between Chicago and the seaboard?

Mr. CLARK. Yes, sir.

Mr. DAY. Is not an exception made in case of grain that takes 116 per cent of the Chicago rate, that it shall have the right of an additional reconsignment in Trunk Line territory?

Mr. CLARK. No, sir; one change is all that is allowed.

Mr. DAY. Do you wish the commission to understand you as saying that you exercise such a supervision over the traffic that traffic that is designed for export may not be resold at the seaboard for domestic consumption; that you can prevent it?

Mr. CLARK. I could not prevent it; no, sir.

Mr. DAY. Traffic that is carried at the export rate may be used at the seaboard for domestic consumption?

Mr. CLARK. I could not say. It passes out of our control when it leaves our rails.

Mr. DAY. Then a person—designing person—can get the benefit of an export rate for traffic designed for domestic consumption to be consumed at the seaboard?

Mr. CLARK. I think not.

Mr. DAY. You think not?

Mr. CLARK. Yes, sir.

Mr. DAY. I would like to have you state how it can be prevented.

Mr. CLARK. Because it is billed to the care of foreign freight agents, who would not permit it to be delivered locally.

Mr. DAY. He sees it on board ship?

Mr. CLARK. Well, it is under his charge—his direction. It can not be delivered, only by his order.

Mr. DAY. Is he your agent?

Mr. CLARK. He is the agent of the lines.

Mr. DAY. What lines?

Mr. CLARK. The lines that we might go by—the Red Line. It would be the agent of the Red Line in that case—the foreign freight agent.

Mr. DAY. Do all the lines that operate over your road maintain a foreign agent at New York, Philadelphia, Baltimore, and Newport News?

Mr. CLARK. Each of the trunk-line railroads has such a gentleman.

Mr. DAY. And all the traffic over their respective lines goes each to its own foreign agent?

Mr. CLARK. Yes, sir.

Mr. DAY. Do you have a foreign agent for export traffic at Newport News?

Mr. CLARK. We do not operate via Newport News.

Mr. DAY. Do not you transfer to the Big Four?

Mr. CLARK. No, sir.

Mr. DAY. Or the Norfolk and Western?

Mr. CLARK. No, sir.

Mr. DAY. The Pittsburg and Western?

Mr. CLARK. No, sir.

Mr. DAY. You do not connect with the Big Four?

Mr. CLARK. Not on traffic for export via Newport News.

Mr. DAY. What is there to prevent it?

Mr. CLARK. There would be no benefit coming to the Lake Shore Railroad by such a connection.

Mr. DAY. Do you have any traffic going over the Baltimore and Ohio?

Mr. CLARK. No, sir.

Mr. DAY. Will you have your agent of the Red Line here to-morrow?

Mr. CLARK. Yes, sir.

Mr. DAY. What did you say his name was?

Mr. CLARK. Mr. Duke Nicholson.

The CHAIRMAN. Had you not better suspend your examination, Mr. Day, until morning?

Mr. DAY. I think it would be well.

At 4.30 p. m. the commission adjourned till to-morrow, Wednesday, at 10 o'clock a. m.

THIRD DAY.

CHICAGO, ILL., *June 9, 1897, 10 a. m.*

The CHAIRMAN. Mr. Day, are you ready to proceed?

Mr. DAY. I will ask Mr. Clark to resume the stand.

JAMES L. CLARK resumed the stand.

Mr. DAY. You were to look over your files and produce the correspondence that was referred to?

Mr. CLARK. Yes, sir.

Mr. DAY. The correspondence with Mr. Grammer?

Mr. CLARK. Yes, sir.

Mr. DAY. You have not the originals with you but you have copies?

Mr. CLARK. Yes, sir.

Mr. DAY. But you have sent for the originals?

Mr. CLARK. Yes, sir.

Mr. DAY. You have sent for the original papers respecting the division of traffic?

Mr. CLARK. Yes, sir.

Mr. DAY. What is that?

Mr. CLARK. This is a telegram from Cleveland, addressed to me. Shall I read the telegram?

Mr. DAY. You may read it.

Mr. CLARK. This is dated Cleveland, February 25:

Be sure to see that our tonnage is reduced. If it is necessary to set Red Line or Lehigh Valley tonnage over to the Nickel Plate in order to reduce our excess, you can do so, but before doing it you must arrange with the Nickel Plate to deliver Red Line business to the New York Central and Lehigh Valley to the Lehigh Valley at Buffalo. I am very anxious that our current business shall show a reduction at once.

G. J. GRAMMER.

Mr. DAY. You had some correspondence with Mr. Grammer respecting this telegram—regarding this telegram?

Mr. CLARK. Well, I think not.

Mr. DAY. Then did you not have some correspondence respecting——

Mr. CLARK. He has copies of reports showing all the conditions all the time.

Mr. DAY. Did you not have letters from him on this subject?

Mr. CLARK. Not until the receipt of this.

Mr. DAY. This was the first communication from Mr. Grammer respecting the pooling?

Mr. CLARK. Respecting the diversion of that traffic.

Mr. DAY. Well, diversion. Had you written to him on the subject?

Mr. CLARK. No, sir.

Mr. DAY. Nor telegraphed him, nor communicated with him in any way?

Mr. CLARK. No, sir.

Mr. DAY. Now, you say this is the first. What correspondence did you have with him after the receipt of this telegram? Did you report to him what you had done?

Mr. CLARK. Yes, sir.

Mr. DAY. I asked you for all correspondence relating to this, and I suppose you thought this paper was a response to my inquiry?

Mr. CLARK. Yes, sir.

Mr. DAY. I will ask you to produce all the correspondence you had with Mr. Grammer or any officer superior to yourself on the Lake Shore

and Michigan Southern road respecting the division of traffic or the diversion of it. This, I understand you to say, is a statement showing the percentage of traffic which under this agreement was to be allotted to the roads out of Chicago to the East?

Mr. CLARK. Yes, sir.

Mr. DAY. You have the original paper at your office and have sent for that?

Mr. CLARK. Yes, sir.

Mr. DAY. In the meantime I want to ask you another question or two, and will afterwards return to this subject. I would like you to explain, taking it up in detail, as if you were relating it to someone who knew nothing of the subject of reconsigning of the traffic, and I want you to state, if you can, every step that is taken with a bill of lading when traffic is reconsigned at these points.

Mr. CLARK. As far as the Lake Shore and Michigan Southern is concerned?

Mr. DAY. You may continue it to your own line.

Mr. CLARK. The traffic comes over the Lake Shore, consigned to New York. It is sold on the board of trade.

Mr. DAY. You say it comes over the Lake Shore?

Mr. CLARK. Yes, sir; consigned to New York.

Mr. DAY. Take the Mississippi River as the point of origin.

Mr. CLARK. We receive from the shipper new directions, giving the point to which he desires to have this traffic conveyed. These shipping directions are received at my office and transmitted to our local department and attached to the expense bill we receive from the Western railway. When the grain is transferred into the Eastern car this expense bill is returned to my office or one of the line offices for a bill of lading.

Mr. DAY. Who returns it to you?

Mr. CLARK. Our local department. This original expense bill that we receive from the Western road. We receive from the shipper of the grain the country bill of lading, the one issued from the point of issue, and we call it a tally—this expense bill; we issue a bill of lading and then return the expense bill back to our local department for filing. I think that about presents it.

Mr. DAY. You require the request of the shipper, you say, to reconsign?

Mr. CLARK. Yes, sir.

Mr. DAY. That is to say, you require the written request of the consignor or the owner of the bill of lading?

Mr. CLARK. The shipper—the one that ships the grain, that buys it on the board of trade. But this bill of lading is not delivered to him. It is delivered to the party bringing us the country bill.

Mr. DAY. Take an instance on your own line. We will just take the first case here, for example [pointing to statement filed with the answer of the Lake Shore and Michigan Southern Railroad]. Take this Harris traffic here, now. This traffic originated on the Mississippi River and came to the order, consigned to the order of J. F. Harris & Co., New York. Now, if Mr. Harris desired that to be reconsigned at Chicago—take that as an instance.

Mr. CLARK. That traffic was consigned through from the Mississippi River, and no action was taken in Chicago in reference to it.

Mr. DAY. I say, assuming that it had been, what would it have been necessary for Mr. Harris to have done, or the shipper?

Mr. Clark. He would have brought to me the original bill of lading

issued by the Chicago, Burlington and Quincy Railroad, and instructed me, if he desired it to go in another direction.

Mr. DAY. You require the written instructions of the owner of the traffic or the shipper of the traffic?

Mr. CLARK. We usually accept that from the shipper of the traffic.

Mr. DAY. The shipper here?

Mr. CLARK. Yes, sir.

Mr. DAY. But do not require any written order from the consignor—from the original shipper?

Mr. CLARK. No, sir.

Mr. DAY. It is the board of trade shipper?

Mr. CLARK. Yes, sir.

Mr. DAY. The man who purchased it on the board of trade?

Mr. CLARK. Yes, sir.

Mr. DAY. What evidence do you require him to show that he owns the traffic; or it may have been consigned from somebody else to somebody else?

Mr. CLARK. You see we do not return to him the bill of lading. It goes to the owner of the property. He, in turn, collects from the owner or shipper.

Mr. DAY. I do not think you understand me, or else I do not understand the practice right. I understand that you require the production of the bill of lading as evidence of the title in the party who asks for the reconsignment.

Mr. CLARK. We do not.

Mr. DAY. Well, if traffic is consigned by J. F. Harris & Co.—Mississippi River notify Lassier & Hooker, Chicago—the traffic is billed through to New York?

Mr. CLARK. We would accept from Lassier & Hooker directions to reconsign it, but would not deliver to them the bills of lading. We would deliver the bill of lading to Harris & Co.

Mr. DAY. Suppose Lassier & Co. had sold traffic here on the board of trade to Cable Jones, or Carrington, Hanna & Co., or Counselman?

Mr. CLARK. We would deliver the bill of lading to the party bringing the country bill of lading.

Mr. DAY. Do you require the order for reconsignment from the person whose name appears on the bill of lading or the way bill?

Mr. CLARK. We understand that traffic changes hands on the board of trade, and anyone coming into our office and says please consign such and such a car to destination, we would do that.

Mr. DAY. Without inquiring as to whether they had title or not?

Mr. CLARK. Yes, sir.

Mr. DAY. Then you make a reconsigning order and send it to the local agent?

Mr. CLARK. Yes, sir.

Mr. DAY. When he gets the car what does he do with this order?

Mr. CLARK. He writes in red ink across this expense bill the reconsigning order.

Mr. DAY. And returns that to you?

Mr. CLARK. That comes to us.

Mr. DAY. You issue a new bill of lading?

Mr. CLARK. Issue a new bill.

Mr. DAY. And surrender that bill to the party who gives up the original bill of lading?

Mr. CLARK. That is right.

Mr. DAY. Now, will you state to the commission how the purchaser on the board of trade buys that traffic. How is he informed what tariff pertains of the tariff charges for transportation up to Chicago?

Mr. CLARK. I do not think I can give every detail of the purchase and sale on the board. One of the gentlemen of the board could do that better.

Mr. DAY. You might give us your ideas, of course, subject to any correction. Give it to us as to how you understand the practice.

Mr. CLARK. The traffic is exhibited on the board in sample bags containing a small portion of the contents of the car, and the car number is written on this package and they offer it on the open market and the Eastern buyer makes his purchase and states to the receiver of this grain to what road he shall send it; and then this receiver gives the direction to the Western railroad to send it to the Eastern railroad to the party he sold it to.

Mr. DAY. Now, the buyer on the board of trade, the purchaser, the man whom you call now the shipper, who gets this grain, how does he know the amount of back charges against that grain?

Mr. CLARK. He knows nothing about it.

Mr. DAY. Here is a car of corn offered to him, say——

Mr. CLARK. I think they usually say—give him the style of the billing. It would say whether through billing or local billing—through billing meaning that it comes from beyond the Mississippi River.

Mr. DAY. And local billing from the Mississippi River up to Chicago?

Mr. CLARK. No; local billing would mean the local rate to Chicago.

Mr. DAY. From the point of origin of the traffic?

Mr. CLARK. Yes, sir.

Mr. DAY. And through billing?

Mr. CLARK. From the Mississippi River.

Mr. DAY. To the seaboard?

Mr. CLARK. To the seaboard.

Mr. DAY. Does that bear on its face the amount of charges that is due?

Mr. CLARK. There is nothing shown in the transaction on the board. They simply know——

Mr. DAY. Then he buys the grain at the Chicago market price, less the charges that are against it?

Mr. CLARK. The purchasers usually—they understand that the through-billed grain brings one price and the local billed another. I believe it is so stated among themselves.

Mr. DAY. Can you explain, Mr. Clark, to the commission what this charge means [indicating]?

Mr. CLARK. Yes, sir; this is a car of grain originating at Martinton, Ill., on the Chicago and Eastern Illinois Railroad. The car was sold to the O'Neill Grain and Elevator Company. The Chicago and Eastern Illinois turns that traffic over in Chicago to the Lake Shore and Michigan Southern Railroad. We transported that car to South Chicago, turning it over to the Elgin, Joliet and Eastern Railroad, and they in turn handed it to the elevator of the O'Neil Grain and Elevator Company. There appears to be a few dollars switching charges that was imposed by the Chicago and Eastern Illinois for some purpose. What, I could not say. The $5 charge, as mentioned there, is the charge that is allowed the Elgin, Joliet and Eastern Railroad for the transit of that grain from South Chicago over to the elevator and back again, they taking the two cars there, the Western car and an empty Eastern car, bringing back the two cars.

Mr. DAY. Was that charge paid?

Mr. CLARK. That charge is paid by the line leading from Chicago to the seaboard wherever the business is.

(The shipment referred to by Mr. Day occurred on March 9.)

Mr. DAY. Did your line pay that?

Mr. CLARK. Yes, sir.

Mr. DAY. Whom did you pay it to?

Mr. CLARK. The Elgin, Joliet and Eastern.

Mr. DAY. And these other instances here in this column—this explanation applies as to them?

Mr. CLARK. Yes, sir.

Mr. DAY. Have you received from your agent the original papers that we asked for?

Mr. CLARK. Yes, sir.

Mr. DAY. You might just state what that paper is. (Referring to paper in hands of witness.)

Mr. CLARK. This is the arbitrators' award in the division of east-bound traffic——

Mr. DAY. State how you received it, and when.

Mr. CLARK. It was received on November 6, 1896, from Cleveland, from Mr. G. J. Grammer's office.

Mr. DAY. Sent to you?

Mr. CLARK. Sent to me. The arbitrators' award in the division of east-bound traffic from Chicago and Chicago junction points, which come under the control of the Joint Traffic Association.

Mr. DAY. If your honors please, the paper relates to two subjects. One shows the division, the apportionment of traffic of dead freight, and the other of live stock, and the witness wants to know if he shall read the entire paper or only that portion relating to the grain.

The CHAIRMAN. They both relate to transportation matters, and one is as important as the other. Probably one of them is not directly on this subject, but we can start another investigation, if necessary.

Mr. CLARK (reading):

After due consideration of the arguments presented and the statistics of traffic forwarded in the past, the arbitrators' award is that east-bound shipments of live stock and dressed meats from Chicago and Chicago junctions, included in this reference, reduced to an equivalent of sixth-class tonnage basis, to be apportioned between the lines in interest from and after September 1, 1896, as follows:

	Per cent.
Baltimore and Ohio	4½
Cleveland, Cincinnati, Chicago and St. Louis Railway	1.1
Chicago and Erie Railway	9.4
Chicago and Grand Trunk Railway	13.2
Lake Shore and Michigan Southern	19.8
Michigan Central Railroad	16.1
New York, Chicago and St. Louis Railroad	11.3
Pittsburg, Cincinnati, Chicago and St. Louis Railway	10.7
Pittsburg, Fort Wayne and Chicago Railway	8.7
Wabash Railway	5.2
Total	100

And that the east-bound dead freight tonnage from Chicago and Chicago junctions, covered by this reference, reduced to an equivalent of sixth-class basis, be apportioned between the lines in interest from and after September 1, 1896, as follows:

	Per cent.
Baltimore and Ohio	8
Cleveland, Cincinnati, Chicago and St. Louis Railway	11.2
Chicago and Grand Trunk Railway	11
Lake Shore and Michigan Southern Railway	14.2
Michigan Central Railroad	13.6

	Per cent.
New York, Chicago and St. Louis Railroad	8.2
Pittsburg, Cincinnati, Chicago and St. Louis Railway	7
Pittsburg and Fort Wayne Railway	14.2
Wabash Railroad	6.6
Total	100

(Signed) J. F. GODDARD,
GARRETT A. HOBART,
E. F. LEONARD,
Arbitrators.

OCTOBER 30, 1896.

Mr. DAY. They are the arbitrators of the Joint Traffic Association?

Mr. CLARK. Yes, sir.

Mr. DAY. I understand you to say, Mr. Clark, that this telegram is the only communication that you received from Mr. Grammer in respect to the diversion of your tonnage to your competitor?

Mr. CLARK. Yes, sir.

Mr. DAY. And did you communicate with him—I will ask you that again; I forget your reply—what action you had taken?

Mr. CLARK. We usually gave him information from time to time showing how much tonnage we were doing in diverting the traffic and the total.

Mr. DAY. How did you do this?

Mr. CLARK. By wire.

Mr. DAY. Now, I asked you to bring this morning and state to the commission how much of your traffic you gave over to your competitors.

Mr. CLARK. Yes, sir.

Mr. DAY. During the first seventy-five days of this year?

Mr. CLARK. Yes, sir; we diverted to the Nickel Plate from February 26 and up to April 1, and during that time diverted to the Nickel Plate Railroad 364 cars, amounting to 12,466,140 pounds.

Mr. DAY. Twelve million?

Mr. CLARK. Yes, sir.

Mr. DAY. Did your road give up any of its tonnage to any other of its competitors during that period?

Mr. CLARK. No, sir.

Mr. DAY. Nothing whatever?

Mr. CLARK. Nothing whatever.

Mr. DAY. Did you have charge of all rebilling out of Chicago for traffic going East over the Lake Shore?

Mr. CLARK. Yes, sir.

Mr. DAY. This particular traffic that you turned over to the Nickel Plate was all described—has all been set out in this?

Mr. CLARK. In the statement?

Mr. DAY. Yes, sir.

Mr. CLARK. No, sir.

Mr. DAY. What portion of it was sent out?

Mr. CLARK. None of this traffic we diverted we included in that statement, as we had no billing of it. It will be shown in the Nickel Plate statement.

Mr. DAY. I think you stated yesterday where you turned it over to them?

Mr. CLARK. Yes, sir; at Englewood.

Mr. DAY. They gave you no billing of it? What receipt did they give you of the traffic, what acknowledgment?

Mr. CLARK. Their local agent would receipt to our local agent for the business.

Mr. DAY. You have those receipts?

Mr. CLARK. I could not say in just what form they are.

Mr. DAY. You have not seen them?

Mr. CLARK. No, sir.

Mr. DAY. You can just put out your initials in that, if that is a copy of the telegram.

Mr. CLARK. Just my initials?

Mr. DAY. Your name, just as you please, and the date.

Mr. CLARK. It is the 9th?

Mr. DAY. Yes, sir; and hand it to the stenographer.

(Hands it to the stenographer. The same is hereto annexed and marked Exhibit 1.)

Mr. DAY. Mr. Clark traffic which was presented to you for reconsignment—what evidence had you of the origin of that traffic before you reconsigned it or issued your order for reconsignment?

Mr. CLARK. We would not know much about it until this expense bill came to the office, or the bill of lading.

Mr. DAY. What evidence would you then have?

Mr. CLARK. This expense bill would show all the facts concerning the car—point of origin and every feature connected with it.

Mr. DAY. You have a rule which the Joint Traffic Association—the Joint Traffic Association has a rule, which you mentioned yesterday, limiting the time in which you were permitted to reconsign to seventy-two hours?

Mr. CLARK. Yes, sir.

Mr. DAY. Now, I observe in your answer here that traffic started from the Mississippi River as early as thirty days prior to its reconsignment here. How do you account for that?

Mr. CLARK. We might have been short of cars, or something of that kind.

Mr. DAY. You might have been short?

Mr. CLARK. Yes, sir.

Mr. DAY. You don't count the seventy-two hours if the grain is waiting for cars?

Mr. CLARK. We count it from the reconsignment of it. We get the reconsigning order, and we consider that that clears the traffic.

Mr. DAY. The waybill and bill of lading, then, may bear different dates?

Mr. CLARK. The bill of lading would be dated the same date as the billing.

Mr. DAY. The date of your waybill and the dating of the starting of the shipment from the Mississippi River; there seems to be thirty days intervening between the dates.

Mr. CLARK. There might have been a shortage of cars.

Mr. DAY. You waybill it before the car goes out?

Mr. CLARK. We don't waybill it until the property goes out.

Mr. DAY. The expense bill is the only evidence you have of the origin of the traffic when you reconsign the expense bill from another carrier?

Mr. CLARK. With the original bill of lading which is presented; that discloses it.

Mr. DAY. Would you reconsign to the Atlantic Seaboard traffic that came on over an Illinois road—from the West, we will say—that was billed to Chicago—destined Chicago—Chicago delivery—would you reconsign that through to the East on a through rate?

Mr. CLARK. With the consent of the Western railroad.

Mr. DAY. Would you, where it went to Chicago for local delivery—would you take out corn on the export rate with the consent of the Western road?

Mr. CLARK. Yes, sir.

Mr. DAY. Then in your practice you would change traffic, local traffic, to through?

Mr. CLARK. Yes, sir.

Mr. DAY. And local delivery to export?

Mr. CLARK. Yes, sir.

Mr. DAY. If it bore a local rate into Chicago of 10 cents a hundred and the export rate to the seaboard from point of origin was 15 cents a hundred, you would carry it through at that rate with the consent of the Western road?

Mr. CLARK. Yes, sir.

Mr. DAY. And if where the local rate into Chicago was 10 cents and the through rate from point of origin to New York was 20 cents you would change it from the local to the through at that rate?

Mr. CLARK. Yes, sir.

Mr. DAY. You taking your proportion of the through rate?

Mr. CLARK. Yes, sir.

Mr. DAY. What is the proportion of the Lake Shore haul on export traffic?

Mr. CLARK. You mean on this 15-cent basis?

Mr. DAY. Yes, sir.

Mr. CLARK. It would be, east of Chicago, 14.6.

Mr. DAY. That is through to the seaboard?

Mr. CLARK. Yes, sir; from Chicago, on a 15-cent basis, from east of the Mississippi River.

Mr. DAY. What would it be from Martinton, in Illinois, the instance I pointed out there where the rate was 16 cents—their export rate was 16 cents?

Mr. CLARK. Was that on a 15-cent basis? I can not just recollect.

Mr. DAY. I am asking you an abstract question. I just mentioned Martinton as an example.

Mr. CLARK. Points on the Chicago and Eastern Illinois Railroad taking Chicago rates?

Mr. DAY. Yes, sir.

Mr. CLARK. You desire to know what the revenue would be on that east of Chicago? That would be 12.6—would be the proper proportion east of Chicago.

The CHAIRMAN. You said that traffic that came to Chicago as local freight would be afterwards changed and given the through rate—either export or otherwise. Under what tariff do you do that?

Mr. CLARK. The published tariff from the Mississippi River. All of the Western railroads publish such tariffs.

The CHAIRMAN. You don't ship to Chicago under that tariff?

Mr. CLARK. No; he has reference to a local rate applying to Chicago. That would be a different tariff.

The CHAIRMAN. I understand what he has reference to; but you carry them under one tariff—under one arrangement or contract to Chicago?

Mr. CLARK. The Western railroads do.

The CHAIRMAN. And you join them if your arrangement afterwards carries it through, do you not?

Mr. CLARK. Yes, sir.

The CHAIRMAN. The arrangements you make afterwards show the through rate?

Mr. CLARK. Yes, sir.

The CHAIRMAN. Of course, your first arrangement don't, but you afterwards change it to show it?

Mr. CLARK. Yes, sir.

The CHAIRMAN. Under what tariff is that?

Mr. CLARK. That is the tariff from the Mississippi River.

The CHAIRMAN. The through tariff. That is the only one you have?

Mr. CLARK. That is the only one we have.

The CHAIRMAN. You ever consult your counsel as to whether you might do that?

Mr. CLARK. That has been the practice.

The CHAIRMAN. Your competitors join in that practice?

Mr. CLARK. I understand it is unusual. The traffic is usually through billing; never did much with the local.

Commissioner PROUTY. Does this tariff show anything about your right to stop over here this seventy-two hours?

Mr. CLARK. I think not.

Commissioner PROUTY. Or say anything about the right of reconsignment?

Mr. CLARK. I think not. That is an association rule.

The CHAIRMAN. What association rule?

Mr. CLARK. Our association under which all the railroads are governed here.

The CHAIRMAN. Has it some name? What is it?

Mr. CLARK. The Central Freight Association of Chicago.

The CHAIRMAN. Now, can you point out to us some provision—is that rule written down, on record?

Mr. CLARK. Yes, sir.

The CHAIRMAN. Will you be kind enough to get us that rule and put it in here, as part of your testimony, under which that was done?

Mr. CLARK. Yes, sir.

Commissioner PROUTY. That rule still in force?

Mr. CLARK. Yes, sir; it is in practice yet.

The CHAIRMAN. The association has gone by, but the things they did they continue to do; that it?

Mr. CLARK. Well, if you will just let me look at that, I will tell you in a moment if it is included there. [Looks at paper.] I made a little error in stating that the 15-cent rate went into effect January 15; it was January 20.

Commissioner PROUTY. Was that the rate from the Mississippi River to New York on export?

Mr. CLARK. Yes, sir.

Commissioner PROUTY. What condition of things existed at that time that required you to make a rate of 15 cents on export business from the Mississippi River?

Mr. CLARK. I understand that it was the competition via the Gulf ports. I think this covers that [referring to paper]: "When shippers request reconsignment, and the same is concurred in by the first carrier and those next to receive it, the authorized inspector shall sanction proper correction of the freight charges of both, so as to conform and maintain the established rates and divisions from original point of shipment or rate to such desired new destination."

Commissioner PROUTY. Where is that?

Mr. CLARK. This is in our testimony. It is filed as Exhibit B, annexed to our answer.

Mr. DAY. The Central Traffic Association. He files it as Exhibit B, I think, to his testimony; but that does not cite local delivery changed to export.

Mr. CLARK. There is no such grain. It is a through billing. You supposed the case, and I said on the consent of the Western railroads we might do this.

Commissioner PROUTY. Who is this inspector?

Mr. CLARK. Mr. Paul B. Rayner is the joint rate inspector.

Mr. PROUTY. By whom is he employed and paid?

Mr. CLARK. By the roads of the association.

Commissioner PROUTY. Of the Central Freight Association?

Mr. CLARK. And the Joint Traffic Association as well, I think.

Commissioner PROUTY. Does he have an office here in Chicago?

Mr. CLARK. Yes, sir.

Commissioner PROUTY. Employ a staff of clerks?

Mr. CLARK. Yes, sir.

The CHAIRMAN. In cases of investigation by the commission, Mr. Clark, about the very low rates from the grain districts west of Chicago East, it has been testified that the low rates were put in—low export rates were put in—as a necessity to meet the low rates from the Mississippi River to the seaboard East. Now, you state that your rates were put in to meet that other. Both of those things are true, I suppose—I mean those two statements stand together?

Mr. CLARK. I could not say about that. That was simply my opinion as to the reason for it, sir.

Commissioner PROUTY. Have you carried much grain on a foreign bill of lading, bound for some foreign ports?

Mr. CLARK. Carried some; we do during the winter months.

Commissioner PROUTY. That is made up of the export rate and the ocean rate.

Mr. CLARK. Yes, sir.

Commissioner PROUTY. Is the export rate under that sort of bill of lading always the same as the published export rate?

Mr. CLARK. Yes, sir.

Commissioner PROUTY. Who issues that bill of lading?

Mr. CLARK. It is issued in the office of the Red Line if via the Red Line.

Commissioner PROUTY. Has the Red Line Company a contract with some steamship line?

Mr. CLARK. They or the shipper has the ocean contract.

Commissioner PROUTY. They have the ocean contract before they make the rate?

Mr. CLARK. Before they make the bill of lading.

Mr. DAY. Where is the headquarters of the Red Line Association? Is it an association or a corporation?

Mr. CLARK. It is a cooperative line.

Mr. DAY. Where are the central offices of that concern?

Mr. CLARK. Buffalo.

Mr. DAY. Who is the head of it?

Mr. CLARK. Mr. Pomeroy is the general manager.

Mr. DAY. Who is the secretary?

Mr. CLARK. They have no secretary.

Mr. DAY. Have they an auditor?

Mr. CLARK. I don't think they have a person under that title. They have a staff to handle the business of that line.

Mr. DAY. What service does the Red Line perform in the transportation of grain to the seaboard?

Mr. CLARK. They solicit the traffic and the railroads take care of it. I guess that answers your question.

Mr. DAY. Is that all the service that they perform?

Mr. CLARK. They keep track of the business—look after it.

Mr. DAY. Do they load and unload cars?

Mr. CLARK. It is done by the railroads.

Mr. DAY. Do they do any cartage?

Mr. CLARK. No, sir.

Mr. DAY. Own any warehouses?

Mr. CLARK. No, sir.

Mr. DAY. Do they own any cars?

Mr. CLARK. No, sir.

Mr. DAY. Their chief business, then, is to solicit traffic for the railroads?

Mr. CLARK. Yes, sir.

Mr. DAY. Who employs them; who pays them—the employees of the Red Line, or the men who work for the Red Line?

Mr. CLARK. They are paid by the general manager.

Mr. DAY. By the general manager?

Mr. CLARK. The general manager of the Red Line pays the employees of the Red Line.

Mr. DAY. Who pays him; where does he get his revenue to pay them; from what source does he derive it?

Mr. CLARK. The railroads furnish that. I stated it was a cooperative line.

Mr. DAY. They are simply agencies of the railroads?

Mr. CLARK. Yes, sir.

Mr. DAY. What besides the Lake Shore, the New York Central, and the West Shore—what other rails does the Red Line operate over?

Mr. CLARK. I could not enumerate them. There are quite a number.

Mr. DAY. Have you the documents at your office showing that?

Mr. CLARK. Yes, sir.

Mr. DAY. Will you furnish them to the commission?

Mr. CLARK. Yes, sir. I will tell you one of the tariffs of the Red Line exhibits all the railroads in the line. They are on file with the commission. I will furnish you one of those tariffs.

Mr. DAY. You were going to give your proportion of your division of the rate from Chicago and eastern Illinois points which take the export rate to the seaboard?

Mr. CLARK. Yes, sir; I said that our proper proportion would be 12.6.

Mr. DAY. I thought that was from the Mississippi River.

Mr. CLARK. That was on a shipment originating at a hundred per cent rate point in Illinois, on the Chicago and Eastern Illinois Railroad.

Mr. DAY. 12.6?

Mr. CLARK. I gave you the export rate.

Mr. DAY. What was that?

Mr. CLARK. 14.6.

Mr. DAY. What would it be to Baltimore delivery?

Mr. CLARK. To Baltimore?

Mr. DAY. Yes, sir.

Mr. CLARK. We do little business with Baltimore. I don't keep in mind the divisions that accrue to the Eastern lines.

Mr. DAY. Could you give the Philadelphia?

Mr. CLARK. I think I could, from the Mississippi River.

Mr. DAY. No, sir; from the eastern Illinois points which take Chicago rates.

Mr. CLARK. 11.6 east of Chicago.

Mr. DAY. Mr. Clark, do you have any information of the instances of false billing?

Mr. CLARK. No, sir.

Mr. DAY. Or that the traffic was underweight?

Mr. CLARK. No, sir.

Mr. DAY. I mean through or intermediate.

Mr. CLARK. I have none; no, sir.

Mr. DAY. No information?

Mr. CLARK. No, sir.

Mr. DAY. Or of traffic alleged to have come from one line, whereas, in fact, it may have come from another to your road?

Mr. CLARK. No, sir.

Mr. DAY. Or to any other roads?

Mr. CLARK. No, sir.

Mr. DAY. In the instances that you have mentioned here of the double switching charge that you pointed out a few minutes ago, your road actually paid over that money?

Mr. CLARK. To the Elgin, Joliet and Eastern; yes, sir.

Mr. DAY. Have you any information that leads you to believe that that was diverted to any other purpose?

Mr. CLARK. I have not.

Mr. DAY. So far as your road was concerned, you regard it as a legitimate payment?

Mr. CLARK. I do.

Mr. DAY. What was the length of the haul?

Mr. CLARK. Well, I presume it is a mile and a half or two miles, something like that.

Mr. DAY. Isn't $5 a car a little heavy charge for a switch of that character, particularly where the traffic is large in volume?

Mr. CLARK. It is because the Elgin, Joliet and Eastern performs a switching service relieving us in the operation of the road of that much labor.

Mr. DAY. Yes; I asked you if that is not a pretty heavy charge for that service?

Mr. CLARK. Considering that they did all the work, I don't think it is.

Mr. DAY. What is the average switching charge made by other lines—the Belt Line, for example?

Mr. CLARK. It would have been $4.

Mr. DAY. The Chicago and Western Indiana? The president of that company testified here that the general charge made by his line was $1.50 for loaded cars.

Mr. CLARK. Well, you understand in the transportation of this grain traffic it requires the movement of two cars.

Mr. DAY. Well, that is to say, loaded and empty?

Mr. CLARK. Yes, sir.

Mr. DAY. And he charged 75 cents for the empty—that is, $2.25 for the service which you say you paid $5?

Mr. CLARK. That was an arrangement which I made myself.

Mr. DAY. With whom did you make it?

Mr. CLARK. With the Elgin, Joliet and Eastern Railway.

Mr. DAY. At whose instance?

Mr. CLARK. My own.

Mr. DAY. Who brought the subject up to your attention?

Mr. CLARK. I think I possibly may have consulted with the Elgin, Joliet and Eastern to see if they would do this work for us.

Mr. DAY. Who else did you consult?

Mr. CLARK. And arranged with the shipper for the traffic.

Mr. DAY. What shipper?

Mr. CLARK. The Chicago-O'Neil Grain Elevator Company.

Mr. DAY. Who did you make the arrangement with of that concern?

Mr. CLARK. Mr. Irwin. I believe it was Mr. Irwin.

Mr. DAY. Tell the commission what the substance of the conversation was that you had with Mr. Irwin respecting that.

Mr. CLARK. He asked if we could handle that grain for him, and I said that I would look into it and see if we could make such an arrangement. Then I visited the Elgin, Joliet and Eastern.

Mr. DAY. What arrangement did he propose—did he make?

Mr. CLARK. Simply to do their business.

Mr. DAY. Are you stating all that was said now—the conversation?

Mr. CLARK. There was nothing; it was if we could do the work.

Mr. DAY. Go on and state what was said.

Mr. CLARK. I then visited the Elgin, Joliet and Eastern and arranged for this price to be paid them to do all switching, relieving us of the labor. That is all there is of it.

Mr. DAY. Who was it made with on the Elgin, Joliet and Eastern?

Mr. CLARK. Mr. Banks.

Mr. DAY. Now, this was grain that was to go into the Chicago-O'Neil Grain Company's elevator?

Mr. CLARK. Yes, sir.

Mr. DAY. Does your company have anything to do with that elevator?

Mr. CLARK. No, sir.

Mr. DAY. Any interest in it?

Mr. CLARK. No, sir.

Mr. DAY. Is it on your rails?

Mr. CLARK. No, sir.

Mr. DAY. What rails?

Mr. CLARK. The Elgin, Joliet and Eastern, and the Belt Line as well.

Mr. DAY. And you arranged that the car should be taken from the rails of the Elgin, Joliet and Eastern?

Mr. CLARK. Arranged for the traffic to be taken from the rails of the Lake Shore by the Elgin, Joliet and Eastern, and taken to the elevator and brought back to us.

Mr. DAY. Brought back to you?

Mr. CLARK. Yes, sir.

Mr. DAY. Why was it taken that roundabout route? Are there any elevators on your rails to which it might be taken?

Mr. CLARK. The shipper had no other elevator.

Mr. DAY. I asked you if there were no other elevators on your rails that could be used for the purpose for which this grain was taken there. For what purpose was it taken to that company?

Mr. CLARK. I could not give you that information—the commercial feature of it.

Mr. DAY. Don't you have some notion?

Mr. CLARK. I suppose it was to rearrange the grade of it. If it was oats it was for clipping purposes.

Mr. DAY. Corn.

Mr. CLARK. I don't think there was any corn.
Mr. DAY. If corn, what then?
Mr. CLARK. If corn, possibly to rearrange the grade of it.
Mr. DAY. In whose cars was it loaded from that elevator?
Mr. CLARK. Outward bound?
Mr. DAY. Yes, sir; for the East.
Mr. CLARK. The Lake Shore cars.
Mr. DAY. Who placed your cars over there?
Mr. CLARK. The Elgin, Joliet and Eastern.
Mr. DAY. What allowance did you make to the Chicago-O'Neill Grain Company for the transferring of that grain?
Mr. CLARK. Have made none.
Mr. DAY. What did you agree upon?
Mr. CLARK. Nothing.
Mr. DAY. They got nothing for that service—the Chicago and Eastern Illinois—for the service of transferring from the Elgin, Joliet and Eastern car to your car?
Mr. CLARK. No, sir.
Mr. DAY. Is it not customary to make an allowance for transfer charges?
Mr. CLARK. It is if by agreement. I had no agreement to make an allowance with them.
Mr. DAY. Did they ask for an allowance?
Mr. CLARK. No, sir.
Mr. DAY. They didn't receive any?
Mr. CLARK. Have never received any.
Mr. DAY. Have an agreement that they shall receive any?
Mr. CLARK. No, sir.
Mr. DAY. And, so far as you know, they had not expectation of receiving any compensation for that service?
Mr. CLARK. I could not say as to what they expect.
Mr. DAY. I asked you so far as you know.
Mr. CLARK. As far as I know they don't; no, sir.
Mr. DAY. Has any claim ever been preferred?
Mr. CLARK. No, sir.
Mr. DAY. In the relation between the Lake Shore road and the Chicago-O'Neil Grain Company, who keeps the accounts between the two accounts on behalf of your company? Who do they deal directly with?
Mr. CLARK. The business is handled the same as all other traffic that is handled over the Lake Shore Railroad. It goes by this process that I recited to you. There are no special books kept.
Mr. DAY. In this instance the $7 charges were added to the freight charges; or were they taken out?
Mr. CLARK. They were taken out.
Mr. DAY. Then you sustained, so far as that traffic is concerned, a loss of the switching charges?
Mr. CLARK. Yes, sir.
Mr. DAY. Where did this $2 charge accrue?
Mr. CLARK. I could not say. I don't understand.
Mr. DAY. Was that imposed upon your company by the Chicago and Eastern Illinois?
Mr. CLARK. It might have been.
Mr. DAY. Was that for shunting the car off at this junction point with the Elgin, Joliet and Eastern at Chicago Heights?
Mr. CLARK. They deliver to us direct. We don't go to Chicago Heights.

Mr. DAY. That is an unusual charge, $2, is it not, on delivering from the Chicago and Eastern Illinois?

Mr. CLARK. I don't understand that special charge. It might have been delayed on the part of the Chicago and Eastern Illinois, and they charged on that, probably, $2. It is only an occasional charge.

Mr. DAY. It appears pretty often here. Here it is another time [referring to paper]. You can not give any explanation of it beyond what you stated?

Mr. CLARK. No. I think it was charged by the Chicago and Eastern Illinois Railway.

Mr. DAY. You paid it all to the Elgin, Joliet and Eastern—the $2?

Mr. CLARK. I could not say whether that was paid to the Chicago and Eastern Illinois or not.

Mr. DAY. They don't disclose it in their answer?

Mr. CLARK. No.

Mr. DAY. They seem to have answered pretty fully respecting the charges. I would like to have some explanation as to what it is, who paid it, and who got it. You say the $7 is taken out of your share of the haul and the through rate was not increased by reason of it?

Mr. CLARK. I don't understand what that $2 is for.

Mr. DAY. Have you any reason to believe that any portion of that was received by the Chicago O'Neil Grain Company?

Mr. CLARK. I am sure they did not.

Mr. DAY. What other rails reach this elevator in South Chicago?

Mr. CLARK. The Belt Line, I believe.

Mr. DAY. Which belt line do you refer to?

Mr. CLARK. The Chicago and Western Indiana.

Mr. DAY. What other rails?

Mr. CLARK. And the Elgin, Joliet and Eastern.

Mr. DAY. And some railroad in addition to that?

Mr. CLARK. Possibly the Rock Island may.

Mr. DAY. Does the Chicago, Hammond and Western touch it?

Mr. CLARK. I think not.

Mr. DAY. You do have physical connection with the Belt Line?

Mr. CLARK. Yes, sir.

Mr. DAY. Did you try to make arrangements with any of the other belt lines to take this traffic for you?

Mr. CLARK. No, sir; as I stated, the Elgin, Joliet and Eastern performed the switching part of the arrangement.

Mr. DAY. You admit that you are paid a higher price than the market. Now, I ask you if you made any effort to have this switching done at the market rate? I want to know, in other words, why you paid more than the market price for that service.

Mr. CLARK. Simply because they performed the work that would have had to been done by our own engine. That was the reason.

Mr. DAY. You made no effort to get the Western Indiana to do the same work? They would do it, would they not? They are engaged in that service?

Mr. CLARK. I made no effort to see them in reference to it.

Mr. DAY. Have you stated to the commission now all that you know or have reason to believe respecting that transaction?

Mr. CLARK. I have.

Mr. DAY. The traffic is large in volume. What other lines beside the Red Line participated in this traffic mentioned in your answer? What other fast freight lines?

Mr. CLARK. The West Shore, the Lake Shore, the Lehigh Valley Route, and the Empire Line.

Mr. DAY. Who is the agent for the West Shore Line?

Mr. CLARK. Mr. G. G. Goble.

Mr. DAY. Is he under your jurisdiction?

Mr. CLARK. Yes, sir.

Mr. DAY. And the agent of the Lehigh Valley, what is his name?

Mr. CLARK. J. H. Lucas.

Mr. DAY. And is he under your supervision?

Mr. CLARK. Yes, sir.

Mr. DAY. A subordinate of yours?

Mr. CLARK. Yes, sir.

Mr. DAY. The Empire Line, also?

Mr. CLARK. And Joseph Stockton, also.

Mr. DAY. That is all I desire to ask Mr. Clark at this time, your honors.

The CHAIRMAN. Is Mr. Burnett in the room, or somebody representing the Wabash?

Interstate Commerce Commission, Exhibit No. 1, grain case—Testimony of J. L. Clark.

[Copy telegram.]

CLEVELAND, *February 25, 1897—12.45 p. m.*

J. L. CLARK:

Be sure to see that our tonnage is reduced. If it is necessary to send Red Line or Lehigh Valley tonnage over Nickel Plate in order to reduce our excess you can do so, but before doing it you must arrange with the Nickel Plate to deliver Red Line business to New York Central and Lehigh Valley business to Lehigh Valley at Buffalo. I am very anxious that our current business will show a reduction at once.

G. J. GRAMMER.

Commenced diverting to Nickel Plate February 26, and ended April 1, and during that time diverted to Nickel Plate 364 cars—12,466,140 pounds.

L. BRIGGS, having been duly sworn, testified as follows:

Mr. DAY. What is your position? What is your occupation?

Mr. BRIGGS. Commercial agent of the New York, Chicago and St. Louis Railroad.

Mr. DAY. Stationed at Chicago?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Who is your official superior, next?

Mr. BRIGGS. The general freight agent.

Mr. DAY. What is his name?

Mr. BRIGGS. George B. Spriggs.

Mr. DAY. What is his residence?

Mr. BRIGGS. Cleveland, Ohio.

Mr. DAY. Is he in town?

Mr. BRIGGS. No, sir.

Mr. DAY. Do you have exclusive charge of the business of the New York, Chicago and St. Louis Railroad here?

Mr. BRIGGS. Under his jurisdiction.

Mr. DAY. I mean to say that you are the superior officer here at this point?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Who are your assistants in the work here?

Mr. BRIGGS. Well, I have a staff of clerks, traveling agents, and a contracting agent.

Mr. DAY. Who are your traveling agents?

Mr. BRIGGS. I. F. Crawford and C. V. Mussin.

Mr. DAY. Where do they reside?

Mr. BRIGGS. In Chicago.

Mr. DAY. Can you give their addresses?

Mr. BRIGGS. I do not know them.

Mr. DAY. Their headquarters are at your office?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Where is your office located?

Mr. BRIGGS. Six and 8 Pacific avenue.

Mr. DAY. Who is your contracting agent?

Mr. BRIGGS. R. T. Davney.

Mr. DAY. What is his address?

Mr. BRIGGS. Park Manor, I think. I am not sure.

Mr. DAY. His headquarters are at your office?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Have you named all the assistants who are engaged in the soliciting of traffic, or contracting for traffic, or making arrangements with shippers respecting transportation over your line or any other line?

Mr. BRIGGS. I have for the New York, Chicago and St. Louis.

Mr. DAY. What fast freight lines operate over your road?

Mr. BRIGGS. The Lackawanna line, the Traders' Dispatch, the Nickle Plate fast freight line, and the Interstate Dispatch from Chicago.

Mr. DAY. What service do these fast freight lines perform in respect to this traffic?

Mr. BRIGGS. They furnish through cars, ostensibly; that is about the principal object of the fast freight.

Mr. DAY. Do they have an equipment of their own that they furnish?

Mr. BRIGGS. Yes, sir.

Mr. DAY. The traffic that they contract for—is that carried exclusively in their own cars or do they simply provide cars?

Mr. BRIGGS. Well, it might be carried in the cars or in our own company's cars, as the case may be. For instance, business generally going by the Traders' Dispatch would be in a Lehigh Valley car or a Traders' Dispatch car.

Mr. DAY. Do the agents of these lines that you have mentioned have power to contract for traffic?

Mr. BRIGGS. They have power to solicit traffic the same as I do.

Mr. DAY. When they secure a shipment—for example, a large shipment of grain—do they report that to you or do they make the contract?

Mr. BRIGGS. I do not know what you mean by contract. I usually handle the business myself.

Mr. DAY. I mean speaking of grain and the products of grain.

Mr. BRIGGS. I usually handle it myself.

Mr. DAY. Have they handled it at all since January 1?

Mr. BRIGGS. They are on the board of trade soliciting grain the same as I am.

Mr. DAY. They have the power to issue bills of lading?

Mr. BRIGGS. Yes, sir; on the Traders' Dispatch, the Lackawanna,

the agent of that line would issue the bill of lading. The bills of lading that I issue would be simply New York, Chicago and St. Louis local points.

Mr. DAY. If they make a contract for a shipment of grain, do they make a report to you about that where it passes over the rails of the Nickel Plate?

Mr. BRIGGS. The grain may be coming every day in a few cars. There may be ten to-day and fifteen to-morrow, and so on. They get lots of cars that we do not know anything about. They do not report all the shipments that come.

Mr. DAY. They do not report all the shipments that go over your rails. What I am trying to get at is, whether they act quite independently of you so far as transportation over your line is concerned.

Mr. BRIGGS. They are under my jurisdiction to a certain extent.

Mr. DAY. When they make a contract, state what they do.

Mr. BRIGGS. What do you mean by a contract?

Mr. DAY. Well, a shipment of grain, or grain products. Say that Carrington & Hanna Co. wanted to transport to Chicago or deliver to your rails, without reference to where it comes from, a consignment of grain to New York.

Mr. BRIGGS. I take it that that would come billed from the original Western point. It might be billed to some Chicago firm, billed to New York; notify this firm in Chicago. If a firm would sell on the board of trade to Carrington & Hanna, the grain being already in our yard, it is ordered to some Eastern point: Carrington & Hanna would give directions to New York or Boston, for instance. If it was a Lackawanna point, it would go by that line, and they would issue the bill of lading; if by the Traders' Dispatch, that agent would issue the bill of lading.

Mr. DAY. Suppose you select the Traders' Dispatch; who is the man that represents that line?

Mr. BRIGGS. N. A. Skinner.

Mr. DAY. They do not run over your line?

Mr. BRIGGS. Yes, sir.

Mr. DAY. If Mr. Skinner secured the traffic from Carrington & Hanna, and if it was routed over the Traders' Dispatch, does Mr. Skinner make a report to you of that fact?

Mr. BRIGGS. He does not have to, because I have the waybills in my office.

Mr. DAY. In that transaction is he acting as a subordinate of yours?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Does he make any different rate than what you make on the traffic?

Mr. BRIGGS. He does not.

Mr. DAY. What advantage could there be to Carrington & Hanna—what advantage to the shipper would there be in his giving to your office and accepting the Traders' Dispatch, rather than turning it over to you to bill directly?

Mr. BRIGGS. So far as Carrington & Hanna are concerned they do not care how it goes. They might want it to go to Lehigh Valley delivery. It is the line billing that takes it to destination. If the car was going to New England it might be a point reached by the Lackawanna or Interstate Dispatch, and we would have to give it to the one making that delivery.

Mr. DAY. When the charges are collected on that traffic are they ever prepaid on this through traffic on grain?

Mr. BRIGGS. I have never known a case where the shipment of grain was prepaid unless it was a station where there is no agent, where it has to be prepaid.

Mr. DAY. Well, say out of Chicago?

Mr. BRIGGS. Out of Chicago to a point on our road where there is no station agent.

Mr. DAY. The charges usually follow the traffic?

Mr. BRIGGS. Yes, sir.

Mr. DAY. When it is billed by the Traders' Dispatch the traffic is turned over to your road to start with?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Does your company get all the earnings for the haul over your rails?

Mr. BRIGGS. Yes, sir; we do.

Mr. DAY. No portion of it goes to the Traders' Dispatch concern?

Mr. BRIGGS. It does not.

Mr. DAY. You collect from the carrier to whom you deliver the charges up to that point?

Mr. BRIGGS. We collect of the connecting carrier our charges, and they of the consignee.

Mr. DAY. So that no money passes between your road and the Traders' Dispatch for this service?

Mr. BRIGGS. No, sir.

Mr. DAY. Who supports the Traders' Dispatch? Is that agency sustained by the road forming the Traders' Dispatch line?

Mr. BRIGGS. Yes, sir.

Mr. DAY. It is simply an auxiliary to the regular railroad line?

Mr. BRIGGS. Yes, sir.

Mr. DAY. The work of the regular railroad agent?

Mr. BRIGGS. Yes, sir.

Mr. DAY. You are not a line agent, as I understand?

Mr. BRIGGS. I am not.

Mr. DAY. You are the agent for the railroad itself—the Nickel Plate road—and you have supervision over the work of these auxiliary lines?

Mr. BRIGGS. Yes, sir; their representative at Chicago, of these lines.

Mr. DAY. So that in fact these people you have mentioned that have their offices in your office and who are your subordinates can not give to the shipper any different service from what you could do. You could do exactly for them what these other men do?

Mr. BRIGGS. Well, if I understand you, I could say to a shipper of grain—I could solicit his business for the Traders' Dispatch or the Lackawanna.

Mr. DAY. You could say to Carrington & Hanna—I use their name because I see it here—you could say to them, if they wanted the Traders' Dispatch, "I can bill for you over the same road and deliver at the same identical point as if you got the billing from them." Is not that true?

Mr. BRIGGS. Yes, sir.

Mr. DAY. I only want to get at the practice. Then you could give them every advantage that the other people could?

Mr. BRIGGS. Yes, sir; that the line agent could.

Mr. DAY. What necessity is there for the sustaining of these line agencies here?

Mr. BRIGGS. I do not know. Of course, the fast freight line, as a line, is represented not only in Chicago, but all over the country, in all large cities, soliciting business for its line. I suppose that is the necessity of it; more solicitation, more agents.

Mr. DAY. At Chicago they do not do anything that you do not do or could not do if they were not here? You are capable of doing all their work, and you do?

Mr. BRIGGS. No, sir; I say that I could do anything in a specific case, but I have not the ability to cover this territory that four men do, or see as many shippers.

Mr. DAY. Well, if you had those men employed directly by the Nickel Plate line you could do that work?

Mr. BRIGGS. I presume so.

Mr. DAY. I am trying to ascertain what is the value, what additional value, the fast freight line renders to the traffic that you can not give yourself, at this point.

Commissioner PROUTY. Do not all the roads that compose this line contribute to the expense of maintaining the line?

Mr. BRIGGS. I am not positive; that is my impression.

Commissioner PROUTY. Do not you understand that the line is organized so that all the roads will contribute to the expense of getting it?

Mr. BRIGGS. I do not know how they were organized.

Commissioner PROUTY. If the Nickel Plate road solicited traffic at Chicago, and it was not solicited by the line, you would be to the entire expense of soliciting it; whereas if the line solicits it the expense is borne by the different roads that participate in the line?

Mr. BRIGGS. It is my impression that the expenses are prorated on the basis of earnings of each road.

Commissioner PROUTY. Is that true of the Nickel Plate expenses?

Mr. BRIGGS. I mean the expenses of the line agents?

Commissioner PROUTY. Mr. Day asked you why you organized that line?

Mr. BRIGGS. I did not organize it, and do not know why it was organized. It was before my time.

Mr. DAY. Did you participate in the making up of this report?

Mr. BRIGGS. No, sir.

Mr. DAY. Did you have anything to do with it?

Mr. BRIGGS. No, sir.

Mr. DAY. You were not consulted?

Mr. BRIGGS. No, sir.

Mr. DAY. Did you ever see it?

Mr. BRIGGS. No, sir.

Mr. DAY. Or the answer?

Mr. BRIGGS. No, sir.

Commissioner PROUTY. What is this witness's connection with the Nickel Plate road?

Mr. BRIGGS. I am the commercial agent. That is my title.

Commissioner PROUTY. What does that mean?

Mr. BRIGGS. It means that I am in charge of the commercial affairs of the Nickel Plate road in Chicago,

Commissioner PROUTY. Not their general freight agent or assistant general freight agent?

Mr. BRIGGS. We have a general freight agent at Cleveland, but no assistant.

Commissioner PROUTY. Your business is to look after this freight and get it?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Do you deal with traffic that comes from Western roads and is billed through, and traffic delivered locally here, both for the Atlantic Seaboard points and intermediate points?

Mr. BRIGGS. Yes, sir.

Mr. DAY. You do not exclude traffic that is not within the trunk-line territory?

Mr. BRIGGS. We do not exclude anything.

Mr. DAY. You take everything that comes?

Mr. BRIGGS. Everything.

Mr. DAY. Is there any agent of the Nickel Plate here in Chicago that is able to explain the report of your road?

Mr. BRIGGS. That report is made up by our local agent, from the records in his office.

Mr. DAY. What is his name?

Mr. BRIGGS. J. L. Lockwood.

Mr. DAY. Is Mr. Lockwood subject to your jurisdiction; does your jurisdiction cover his office?

Mr. BRIGGS. Well, to a certain extent; but generally he is under the jurisdiction of the general freight agent. Of course, if I ask Mr. Lockwood to do anything——

Mr. DAY. In the way of making up a report, he would do it?

Mr. BRIGGS. Yes, sir; he would.

Mr. DAY. In the division of traffic on the roads in this territory, do you have anything at all to do with seeing to it that your road gets its share?

Mr. BRIGGS. I have never been officially advised of any such agreement.

Mr. DAY. I am not asking you about any agreement.

Mr. BRIGGS. Getting our share under the division of tonnage?

Mr. DAY. I asked you, in the division of the traffic, whether you had anything to do with securing your road its share?

Mr. BRIGGS. What do you mean by "the division of the traffic?"

Mr. DAY. Well, you know what I mean. I did not mention any agreement. I asked if it was part of your duty or came within your work to see that your road got its share of the traffic?

Mr. BRIGGS. I am instructed to get all I can legitimately.

Mr. DAY. Have you had anything to do with getting traffic from other roads—competing lines?

Mr. BRIGGS. No, sir.

Mr. DAY. You have had no correspondence in relation to it?

Mr. BRIGGS. No, sir.

Mr. DAY. Have you had any supervision of the traffic delivered from other points to your road?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Other competing roads?

Mr. BRIGGS. Yes, sir.

Mr. DAY. In the past four or five months, tell the commission what you have had to do in respect to that?

Mr. BRIGGS. I do not know that I have had anything special to do with it?

Mr. DAY. Have you had any personal supervision of traffic delivered to your road from competing roads like the Lake Shore, the Baltimore and Ohio, the Michigan Central, the Big Four, and the Wabash?

Mr. BRIGGS. I do not know of any jurisdiction that would be necessary if the traffic was——

Mr. DAY. I am asking you if you had anything to do with the delivery of the traffic to your road?

Mr. BRIGGS. No, sir.

Mr. DAY. Do you know whether any has been delivered to your road?

Mr. BRIGGS. Yes, sir.

Mr. DAY. From what road?
Mr. BRIGGS. The Lake Shore.
Mr. DAY. What other road?
Mr. BRIGGS. I think the Baltimore and Ohio.
Mr. DAY. What other?
Mr. BRIGGS. I do not know of any other.
Mr. DAY. When was the Lake Shore traffic delivered to your road?
Mr. BRIGGS. I do not remember.
Mr. DAY. About when?
Mr. BRIGGS. About February or March.
Mr. DAY. When was the Baltimore and Ohio?
Mr. BRIGGS. About the same time, I think.
Mr. DAY. Was there any considerable quantity of it?
Mr. BRIGGS. Yes, sir. You probably have it in those sheets, if they are correctly compiled.
Mr. DAY. How did you acquire the information that it had been delivered?
Mr. BRIGGS. From the record of waybills in our office.
Mr. DAY. Did the waybills of that office pass through your office?
Mr. BRIGGS. Yes, sir.
Mr. DAY. And through the office of the local agent?
Mr. BRIGGS. Yes, sir; I get a tissue copy. He keeps one there, and sends one to my office of all traffic billed.
Mr. DAY. Do you have any information other than what you procure from your local agent by this tissue copy?
Mr. BRIGGS. No, sir. The only other information had—I might say, the Lake Shore stated to me that they would turn us over some traffic, and the Baltimore and Ohio stated the same thing.
Mr. DAY. Who stated it for the Lake Shore?
Mr. BRIGGS. Mr. Clark.
Mr. DAY. And who for the Baltimore and Ohio?
Mr. BRIGGS. Mr. Bigelow.
Mr. DAY. What else did Mr. Bigelow say?
Mr. BRIGGS. I can not recollect anything further.
Mr. DAY. What provoked that remark; what led up to it?
Mr. BRIGGS. Nothing; he simply met me and said that he would give us some traffic.
Mr. DAY. What did you say?
Mr. BRIGGS. I said that I would be very glad to receive it.
Mr. DAY. Had you had a conversation of that kind before with him on any previous occasion?
Mr. BRIGGS. No, sir.
Mr. DAY. That was the first time you had any conversation with Mr. Bigelow about getting traffic from his road?
Mr. BRIGGS. As I recollect; yes, sir.
Mr. DAY. Is that all he said? Was there not something that induced that conversation?
M. BRIGGS. No, sir.
Mr. DAY. Some complaint that you were not getting all you ought to have?
Mr. BRIGGS. I did not solicit it from either of them.
Mr. DAY. Did you make any complaint that you were not getting your share for your road?
Mr. BRIGGS. No, sir; I did not.
Mr. DAY. You did not make complaint?
Mr. BRIGGS. I did not.

Mr. DAY. Did anybody connected with your road, that you know of, complain that you were not getting your share?

Mr BRIGGS. They did not.

Mr. DAY. You did not receive some communication from Mr. Spriggs—some complaint that you were not getting out of Chicago the amount of traffic that your road was entitled to?

Mr. BRIGGS. I did not.

Mr. DAY. None whatever?

Mr. BRIGGS. None that I recall. I have outlined the conversation as I understood it.

Mr. DAY. Yes; I understand you to say that you stated substantially what occurred between you and Mr. Bigelow. Where did you meet him?

Mr. BRIGGS. I think on the corner of Jackson street and Pacific avenue.

Mr. DAY. And he made the remark that he would give you some traffic?

Mr. BRIGGS. Yes, sir.

Mr. DAY. And you said you would be glad to have it?

Mr. BRIGGS. Yes, sir; I said I would be very glad to have it.

Mr. DAY. How much was it, approximately?

Mr. BRIGGS. I do not remember; I have not the details or figures.

Mr. DAY. Did you exercise any discretion as to how it should be routed?

Mr. BRIGGS. None whatever.

Mr. DAY. Who did that?

Mr. BRIGGS. The traffic was delivered to us at our rails at Stony Island, and our agent took care of it in the usual way.

Mr. DAY. Do your rails connect with the Baltimore and Ohio at Stony Island?

Mr. BRIGGS. Yes, sir.

Mr. DAY. They shunted the traffic from one line to the other?

Mr. BRIGGS. Yes, sir; they have a Y there.

Mr. DAY. And you took it off there?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Did you give directions to your agent to take it off?

Mr. BRIGGS. I did.

Mr. DAY. How; by letter?

Mr. BRIGGS. Over the telephone.

Mr. DAY. What did you say to him?

Mr. BRIGGS. I told him that the Baltimore and Ohio was going to give us some traffic, and to look out for it.

Mr. DAY. Did you have any documentary evidence from the Baltimore and Ohio?

Mr. BRIGGS. None whatever.

Mr. DAY. How could you tell what the traffic was, where it was to go?

Mr. BRIGGS. The Baltimore and Ohio undoubtedly supplied our local agent with the instructions where to bill it to.

Mr. DAY. You did not know anything about that?

Mr. BRIGGS. No, sir.

Mr. DAY. What did you say his name was?

Mr. BRIGGS. J. L. Lockwood.

Mr. DAY. Will you ask him to come here this afternoon?

Mr. BRIGGS. He is in Washington, attending a convention of local agents.

Mr. DAY. When do you expect him back?

Mr. BRIGGS. I presume next week.

Mr. DAY. What became of this traffic? Where was it turned over to the connecting carrier?

Mr. BRIGGS. By us, East?

Mr. DAY. Yes, sir.

Mr. BRIGGS. To the Pittsburg and Western at Painesville.

Mr. DAY. That is the Baltimore and Ohio?

Mr. BRIGGS. Practically; yes, sir.

Mr. DAY. How far east of here is Painesville?

Mr. BRIGGS. I could not say exactly.

Mr. DAY. Well, approximately?

Mr. BRIGGS. Well, it is east of Cleveland. You know how far that is?

Mr. DAY. What is your portion of the haul, of the earnings for that traffic?

Mr. BRIGGS. I do not remember.

Mr. DAY. You have the evidence in your office of the rates at which it is carried?

Mr. BRIGGS. Yes, sir.

Mr. DAY. You have the evidence?

Mr. BRIGGS. Yes, sir; we have the way bills.

Mr. DAY. You collected the money for your share of the transportation?

Mr. BRIGGS. From the Pittsburg and Western.

Mr. DAY. They advance the charges?

Mr. BRIGGS. They always do; that is customary.

Mr. DAY. Will you present to the commission a statement of the amount you received—which your road received—from the Pittsburg and Western road for that particular traffic?

Mr. BRIGGS. You mean the entire amount of the traffic?

Mr. DAY. Yes, sir; the entire amount of the traffic. The rate at which it was carried, your portion, and the total sum you received.

Mr. BRIGGS. That will take a long time to make that statement.

Mr. DAY. Why will it take a long time?

Mr. BRIGGS. Because we have to search all through our records to get it. I can give you the divisions of earnings.

Mr. DAY. Well, give the divisions of earnings and the rate.

Mr. BRIGGS. You understand there were different commodities; it was not all one commodity; and the rates, too, vary.

Mr. DAY. What was there besides grain?

Mr. BRIGGS. I think there was some fertilizer.

Mr. DAY. What else?

Mr. BRIGGS. I can not tell you—various articles.

Mr. DAY. Well, you can make a statement to the commission.

Mr. BRIGGS. I can tell the commodities, the rate, and the division of earnings.

Mr. DAY. The commodities carried, the weight, the rate, and the division?

Mr. BRIGGS. I will have to go to all our records. I can give in a general way the commodities carried, the rate on that traffic, and the division of the rate.

Mr. DAY. If you will give the commission the number of cars, if it is difficult to make up the weight. Mr. Clark found no difficulty in making up the weight.

Mr. BRIGGS. I can give you the number of cars, the different commodities, the rate on each commodity, and the division.

Mr. DAY. And you will be prepared to state whether the rate charged

by you—the division which you report to the commission—was actually collected from the Pittsburg and Western?

Mr. BRIGGS. Yes, sir; I state that now.

Mr. DAY. A part of this traffic that was turned over to you by the Baltimore and Ohio. The Baltimore and Ohio Railroad appears to be the consignor, the owner of the traffic, the shipper?

Mr. BRIGGS. They do not own any. So far as we are concerned, they are the consignors.

Mr. DAY. They do not appear to be the consignor, excepting for a very small part of it. The great bulk of it—the consignor is stated in all cases. A few cars are stated here to be the Baltimore and Ohio Railroad as the consignor, and Gill & Fisher consignee. How do you know the Baltimore and Ohio does not own that?

Mr. BRIGGS. The Baltimore and Ohio does not own any grain.

Mr. DAY. What leads you to that belief?

Mr. BRIGGS. I do not know any railroad that owns any grain.

Mr. DAY. You just suppose that, and therefore you make that statement?

Mr. BRIGGS. I could not say positively, because I do not know. But I do not suppose any railroad owns any grain.

Mr. DAY. Did your road receive any traffic from the Michigan Central?

Mr. BRIGGS. I do not recall any.

Mr. DAY. How about the Wabash?

Mr. BRIGGS. I do not recall any from the Wabash.

Mr. DAY. Or the Big Four?

Mr. BRIGGS. Nor the Big Four.

Mr. DAY. Nor the Grand Trunk?

Mr. BRIGGS. Nor the Grand Trunk.

Mr. DAY. Nor the Pennsylvania?

Mr. BRIGGS. Nor the Pennsylvania.

Mr. DAY. Does your company own or control any elevators in Chicago or at Chicago junction points?

Mr. BRIGGS. Yes, sir. We have an elevator located on our tracks at Stony Island.

Mr. DAY. Who operates that?

Mr. BRIGGS. Harry G. Chase.

Mr. DAY. What do you pay him for transfer charges?

Mr. BRIGGS. I do not pass upon the vouchers and I could not say definitely, but it is my understanding that he receives $1.50 on oats and $1 on all other grain.

Mr. DAY. Who does pass upon his vouchers?

Mr. BRIGGS. I do not know.

Mr. DAY. Have you no information as to what officer of your company passes on his claim for transfer charges?

Mr. BRIGGS. I presume that it passes through the general freight office, but do not know positively, and can not say.

Mr. DAY. You do not approve them?

Mr. BRIGGS. No, sir.

Mr. DAY. You do not make any inspection of them?

Mr. BRIGGS. No, sir.

Mr. DAY. They do not come through your office?

Mr. BRIGGS. No, sir.

Mr. DAY. He forwards them direct to the general freight agent at Cleveland?

Mr. BRIGGS. I do not know to whom he forwards them, but I presume he does inform him of any inquiries as to that

Mr. DAY. What he receives you do not know, you say, of your own knowledge?

Mr. BRIGGS. I am of the opinion that he receives $1.50 on oats, and $1 on all other grain.

Mr. DAY. At Painesville, Ohio, your rails connect with the Pittsburg and Western?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Where is Calumet Elevator A?

Mr. BRIGGS. Calumet Elevator A is on the Elgin, Joliet and Eastern, and the Belt, at South Chicago.

Mr. DAY. How many elevators are there at South Chicago that are accessible to your rails?

Mr. BRIGGS. I think all of them; they are not on our rails, but are accessible to us.

Mr. DAY. This traffic which was turned over to you by the Baltimore and Ohio, did you furnish the cars for that traffic?

Mr. BRIGGS. We did not.

Mr. DAY. Whose cars did that traffic go forward in?

Mr. BRIGGS. The Baltimore and Ohio cars.

Mr. DAY. Does any fast freight line operate over your line and the Baltimore and Ohio?

Mr. BRIGGS. No, sir.

Mr. DAY. What fast freight line operates over the Baltimore and Ohio?

Mr. BRIGGS. None. The Continental Line out of St. Louis, I guess. I do not know whether they operate out of Chicago or not; I think they have none. Oh, yes, there is the Central States Dispatch, which operates over the Baltimore and Ohio out of Chicago.

Mr. DAY. You think this traffic was forwarded in Baltimore and Ohio cars?

Mr. BRIGGS. I am quite sure of it.

Mr. DAY. What leads you to think that?

Mr. BRIGGS. Because in looking over the waybills at that time, my recollection is that it all appeared to be in the Baltimore and Ohio cars. We certainly would not furnish cars for it.

Mr. DAY. I would like to know whether any of it was carried forward in the cars of the Traders' Dispatch?

Mr. BRIGGS. Well, I can not say. I do not think there was any of it.

Mr. DAY. Have you any means of ascertaining?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Will you ascertain that and report to the commission whether any of it was carried forward in the Traders Dispatch cars?

Mr. BRIGGS. I could say now definitely that there were only a few cars, one or two cars that the Baltimore and Ohio might have on its line and pick up and send this grain in those cars. But we did not give a single car to the Baltimore and Ohio to load that traffic.

Mr. DAY. In your answer, you refer to L. L. Does that mean the Lackawanna line?

Mr. BRIGGS. Yes, sir. Is my answer to your previous question sufficient without my going over the records? I say that we did not give a single empty car to the Baltimore and Ohio to load that grain and there were only a few probably of the Traders Dispatch.

Mr. DAY. They did not have anything to do with the transfer?

Mr. BRIGGS. They brought the cars that they picked up on their own rails to us and did not make any requisition on us for empties. If they had, they would not have gotten any.

Mr. DAY. Why not?

Mr. BRIGGS. Because we had use for all of our own empties at that time.

Mr. DAY. Why would not you in taking traffic for them furnish them with cars for the traffic the same as any other shipper?

Mr. BRIGGS. We did not have the cars to spare.

Mr. DAY. Would you have had cars to provide for other people, if they wanted to ship?

Mr. BRIGGS. That is the reason we would not furnish them to the Baltimore and Ohio.

Mr. DAY. Suppose Carrington, Hanna & Co. wanted to ship?

Mr. BRIGGS. That is the reason we would not supply them to the Baltimore and Ohio. We would not supply them if they wanted to load on the Baltimore and Ohio. If they wanted to load on our rails we would At that time we were short of empties and could not afford to give the Baltimore and Ohio empties. If we had had the empties we would have been glad to supply them.

Mr. DAY. Do you bill through to the United Kingdom, say, to London or Liverpool?

Mr. BRIGGS. We do not.

Mr. DAY. But your line agents bil' through?

Mr. BRIGGS. They do not.

Mr. DAY. On traffic that is billed for export, that is, billed through, going over the Traders' Dispatch or the Lackawanna, or any of the lines operating over the Nickel Plate, who issues the bill of lading?

Mr. BRIGGS. The agent of that line.

Mr. DAY. Of that line? Does he issue in any instance a bill of lading beyond the seaboard?

Mr. BRIGGS. He does.

Mr. DAY. In what instance?

Mr. BRIGGS. In any instance where it is for export, if they wish an export bill of lading other than grain.

Mr. DAY. Other than grain?

Mr. BRIGGS. Other than grain.

Mr. DAY. He does it on other commoditie besides grain?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Why do you have an export rate on other commodities besides grain?

Mr. BRIGGS. Our export rate is the inland rate plus the ocean rate arrived at from day to day. It is a combination of the ocean and inland rate.

Mr. DAY. Do you make a through rate at any time?

Mr. BRIGGS. Yes, sir; by ascertaining the ocean rate, but not on grain.

Mr. DAY. Not on grain? They have a fixed export rate?

Mr. BRIGGS. Shippers, as a rule, make their own arrangements for the shipment of grain. They make arrangements for shipment by a certain steamer, and it is too risky to make an export rate, as the steamer may leave without the grain, and then we would be bound for the storage.

Mr. DAY. And you decline to issue through bills for grain?

Mr. BRIGGS. We have not issued any.

Mr. DAY. Do you on flour?

Mr. BRIGGS. Yes, sir.

Mr. DAY. What is the export rate on flour from Chicago?

Mr. BRIGGS. To-day?

Mr. DAY. Yes, sir.
Mr. BRIGGS. I do not know.
Mr. DAY. What was it yesterday?
Mr. BRIGGS. I do not know.
Mr. DAY. The day before?
Mr. BRIGGS. I have not had any occasion to make any inquiry.
Mr. DAY. Do you know what it was at any time during the past three months—what it was at any time?
Mr. BRIGGS. No, sir.
Mr. DAY. When did you last quote an export rate?
Mr. BRIGGS. I can not remember.
Mr. DAY. Have you quoted an export rate this year?
Mr. BRIGGS. I think not.
The CHAIRMAN. Mr. Briggs, it is our usual time for taking a recess, and we will adjourn now until 2 o'clock.

AFTER RECESS.

JUNE 9, 1897, 2.15 p. m.

The CHAIRMAN. Gentlemen, the commission has made the following amendment to the order in this proceeding:

It appearing that the order in this matter, originally made on the 10th day of March, A. D. 1897, at Washington, D. C., may not be sufficiently broad to include traffic originating west of Chicago and transported through Chicago and Chicago Junction points, it is ordered that the aforesaid original order be enlarged and amended so as to include all transportation of grain and grain products from or through Chicago and Chicago Junction points to the points named in said original order and intermediate points.

Mr. WILLIAMSON. I suppose the roads which have already complied with that need pay no further attention to it?
The CHAIRMAN. We have enlarged the order, that witnesses may not be mistaken as to the scope of the inquiry.
Mr. WILLIAMSON. I think some of the roads have answered fully.
Mr. DAY. I will ask Mr. Briggs to resume the stand.

L. BRIGGS resumed the stand.

Mr. DAY. I think when we adjourned, Mr. Briggs, we were discussing the matter of export bills. You were explaining to me what traffic goes forward under through bills of lading to, say, the United Kingdom, or any point abroad to which bills are issued, and I think you got to the point of stating that export traffic over your route over which you issue through bills of lading for export traffic was limited to live freight or other goods than grain.
Mr. BRIGGS. Yes, sir.
Mr. DAY. You will state just what the fact is where you were interrupted. You were right in the middle of it, and I want a complete explanation as to that.
Mr. BRIGGS. I stated that it was not customary, as a rule, to issue through bills of lading to Liverpool and foreign ports on grain. The owner of the grain, as a rule, contracts his ocean freights and takes domestic bills on grain to New York or Boston, as the case may be.
Mr. DAY. Have you issued any through bill on grain this year?
Mr. BRIGGS. I have no recollection of doing so.
Mr. DAY. I understood you to say that where you do issue through bills the rate is made up—how?
Mr. BRIGGS. You mean on a through rate to Liverpool, for instance?
Mr. DAY. Yes, sir; or London.

Mr. BRIGGS. It would be made up of the tariff rate to the seaboard plus the obtainable ocean rate at the time the contract was made with the ocean steamship.

Mr. DAY. Who quotes the steamship rate when you issue through bills?

Mr. BRIGGS. We either get them from the steamship agents at Chicago or from some of the steamship agents in New York.

Mr. DAY. The traffic that is carried over your line to the seaboard which bears an export rate is that billed out on a through bill of lading to the point of final destination?

Mr. BRIGGS. The only export rate is on corn. We would give a bill of lading reaching to New York for export.

Mr. DAY. You have not billed any of that through to Liverpool?

Mr. BRIGGS. No, sir.

Mr. DAY. What has been your export rate on corn this year?

Mr. BRIGGS. Fifteen cents. I do not remember whether it has been that the entire year, but there is a rate of 15 cents on export corn.

Mr. DAY. Has it ever been lower than that?

Mr. BRIGGS. No, sir.

Mr. DAY. Do you know of any instance where grain for export was carried for a lower rate than 15 cents to the seaboard?

Mr. BRIGGS. All rail?

Mr. DAY. Yes, sir; all rail.

Mr. BRIGGS. I do not.

Mr. DAY. Do you know of any instance where it was carried lower by rail than by water?

Mr. BRIGGS. Well, I think the prevailing rate on corn to New York—though I am not sure—by lake and rail to day, would be less than 15 cents to New York.

Mr. DAY. That is water to Buffalo and then rail, is it?

Mr. BRIGGS. Yes, sir.

Mr. DAY. How low have you heard that quoted?

Mr. BRIGGS. Well, I can not say. I am not familiar with that.

Mr. DAY. You do not participate in that traffic at all?

Mr. BRIGGS. No, sir; we do not.

Mr. DAY. I am asking you simply for information what you had heard it quoted at.

Mr. BRIGGS. Well, I have not the data.

Mr. DAY. There is a traffic here billed out by your road; was carried over your road February 9. This particular lot of corn was carried East for export. I understood you this morning to say that if it was export grain that you issued a through bill.

Mr. BRIGGS. No, sir.

Mr. DAY. Do you mean to say that you do not issue a through bill at all on grain?

Mr. BRIGGS. Did not on any of that grain. Lately they are not issuing export bills of lading on grain—that is, a through bill of lading.

Mr. DAY. Can you tell me what your divisions were on this export grain?

Mr. BRIGGS. Where did it go to?

Mr. DAY. It was destined to Liverpool, according to this bill; delivered to New York, billed to New York. Munford & Co. to Collander, at Liverpool; order, inform W. S. Collander. Perhaps he was in New York.

Mr. BRIGGS. I take it he was.

Mr. DAY. Do you know who Collander is?

Mr. BRIGGS. No, sir. I can give you the division of the rate to Buffalo, if that is what you want. I can not give it to you just now.

Mr. DAY. Do you get a different division of the traffic through to New York than on the division to Buffalo?

Mr. BRIGGS. We get our local rate to Buffalo, 12½ cents; but we get our proportion of 15 to New York.

Mr. DAY. You do not know what that is?

Mr. BRIGGS. I can get it.

Mr. DAY. I would like to know that. This grain, in which Munford was the consignor, it was carried at the export rate. You do not know who Collander is, the man who was to be notified of it at New York?

Mr. BRIGGS. I do not know him.

Mr. DAY. How do you know that grain went for export?

Mr. BRIGGS. I do not know that.

Mr. DAY. You do not have any information respecting that.

Mr. BRIGGS. No, sir.

Mr. DAY. If a person came to you offering grain going for export by way of New York, you would take it on his statement at the export rate?

Mr. BRIGGS. We would bill it to New York for export if he declared it was to go for export.

Mr. DAY. You do not have any proof that it is in fact for export?

Mr. BRIGGS, No; we have no way of knowing it.

Mr. DAY. As far as your road is concerned, that traffic may be used for domestic purposes—domestic consumption at the port of New York—or at whatever port in the East it is delivered at?

Mr. BRIGGS. After we give it to the connection at Buffalo we do not know what becomes of it. Our interest ceases when we deliver it.

Mr. DAY. A man comes to you, having a house in New York, and he tells you he wants you to carry this grain to New York for export. You carry it for him at the export rate?

Mr. BRIGGS. If billed for export it would be taken at the export rate.

Mr. DAY. How is it expressed?

Mr. BRIGGS. Corn to New York for export.

Mr. DAY. On the bill of lading?

Mr. BRIGGS. Yes, sir.

Mr. DAY. How is it done in the waybills?

Mr. BRIGGS. The same way, exactly. It is usually billed to some foreign agent at New York, who looks out for the exporting of it.

Mr. DAY. Speaking of the traffic of the Baltimore and Ohio that was turned over to you in February. Do you remember the amount that was in February?

Mr. BRIGGS. I am having a statement compiled of that this afternoon.

Mr. DAY. Showing the quantity of it?

Mr. BRIGGS. Yes, sir.

Mr. DAY. And your division?

Mr. BRIGGS. And the division.

Mr. DAY. The traffic—where was it loaded?

Mr. BRIGGS. Some of it came from elevators to Chicago, and some came from Western roads to the Baltimore and Ohio.

Mr. DAY. How do you know any of it came out of the elevator in Chicago?

Mr. BRIGGS. Our waybills show where it came from.

Mr. DAY. And they show it came out of the elevators?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Whose elevators?
Mr. BRIGGS. I do not remember now the name of the elevator.
Mr. DAY. Do you remember any of them?
Mr. BRIGGS. I think some of it came from the Union Elevator.
Mr. DAY. And what other?
Mr. BRIGGS. I do not remember any other.
Mr. DAY. You do remember that some of it came out of elevators?
Mr. BRIGGS. Yes, sir.
Mr. DAY. And remember that some of it came from Western roads?
Mr. BRIGGS. Yes, sir.
Mr. DAY. They turned it over to the Baltimore and Ohio, and they turned it over to you. The waybills contain that—the expense bill, or whatever it was?
Mr. BRIGGS. The waybills show the originating point.
Mr. DAY. What waybills do you speak of?
Mr. BRIGGS. Our own.
Mr. DAY. They showed a point at which it originated?
Mr. BRIGGS. Yes, sir.
Mr. DAY. And how was that information acquired as to the point of origin?
Mr. BRIGGS. The Baltimore and Ohio, in turning the cars over to us, turned over their expense bills, showing the point of origin.
Mr. DAY. That was the evidence upon which your waybill was made up?
Mr. BRIGGS. Yes, sir.
Mr. DAY. Have you those expense bills?
Mr. BRIGGS. Undoubtedly.
Mr. DAY. I will ask you, Mr. Briggs, to produce those expense bills to the commission. Now, what back charges were there accompanying this grain?
Mr. BRIGGS. Back charges?
Mr. DAY. Yes, sir.
Mr. BRIGGS. If a car came from a Western road their charges would follow as back charges.
Mr. DAY. What other charges?
Mr. BRIGGS. I do not know of any other charges.
Mr. DAY. Did you make any allowance to the Baltimore and Ohio for loading the cars, for transferring the grain from the Western cars to their cars?
Mr. BRIGGS. I did not; no, sir.
Mr. DAY. Did your road?
Mr. BRIGGS. I do not know.
Mr. DAY. Or switching expenses? Would your record show that?
Mr. BRIGGS. No, sir.
Mr. DAY. They would not show it?
Mr. BRIGGS. No, sir.
Mr. DAY. You have indicated the switching expenses in this paper [referring to answer of railroad].
Mr. BRIGGS. No.
Mr. DAY. It is here.
Mr. BRIGGS. That must be the switching expense of getting to the elevator, which follows as back charges?
Mr. DAY. From where to the elevator?
Mr. BRIGGS. From the elevator, the switching of the road, pulling the car into the elevator, the elevator was probably not on the Baltimore and Ohio, but on some foreign road.

Mr. DAY. Here is an instance where the switching charge is $1.

Mr. BRIGGS. That is the switching, I think, to the Union Elevator, $1.

Mr. DAY. To the elevator?

Mr. BRIGGS. Yes, sir.

Mr. DAY. It says, under the captions "name of connecting carrier, rail or water, switch or transfer line from which received, and waybill reference, number and date," your report shows Baltimore and Ohio Railroad, from which it was received; P. R. O., as near as I can make it out, D, 114.

Mr. BRIGGS. That is the pro number.

Mr. DAY. What does that mean?

Mr. BRIGGS. It is a system of keeping accounts in the local office.

Mr. DAY. That is your own private reference?

Mr. BRIGGS. Either ours or the the Baltimore and Ohio's; probably ours.

Mr. DAY. What does "D" indicate?

Mr. BRIGGS. That is a series.

Mr. DAY. And "number" means what?

Mr. BRIGGS. I can not tell you the technical meaning of those. It is some system the local agents have of keeping their accounts. They are ready references.

Mr. DAY. Is it possible that the switching charge was some service rendered by the Baltimore and Ohio road?

Mr. BRIGGS. If there is any switching charge following those shipments of grain from an elevator—in other words, the Union Elevator, as I now recall it, is not on the Alton road, and they make a charge of $1 to reach that elevator, and in giving us that it is charged as back charge against the grain.

Mr. DAY. What road does the switching from your road to the elevator in that case?

Mr. BRIGGS. They would do it for the Baltimore and Ohio in that case.

Mr. DAY. What road does the switching?

Mr. BRIGGS. The Chicago and Alton in that case, or it might be the Baltimore and Ohio run up there, with a trackage arrangement, with their own engines.

Mr. DAY. Can you give approximately the number of cars that were turned over to you by the Baltimore and Ohio?

Mr. BRIGGS. I can not tell you. I will tell you that to-morrow morning.

Mr. DAY. Did it occur more than once?

Mr. BRIGGS. No, sir.

Mr. DAY. There has been one lot?

Mr. BRIGGS. You mean on one day?

Mr. DAY. Yes, sir.

Mr. BRIGGS. Oh, no; it continued for a day or two.

Mr. DAY. A day or two?

Mr. BRIGGS. I do not know. I will give you the data to-morrow.

Mr. DAY. You will furnish that to-morrow, with the other data required?

Mr. BRIGGS. Yes, sir.

Mr. DAY. And these expense bills that accompanied the traffic that were turned over to you by the Baltimore and Ohio. The expense bills that we wish you to bring are the expense bills for grain and the products of grain, but the traffic which you are to report to the commission is all the traffic that was turned over to your road by the Baltimore and Ohio and also by any other road.

Mr. BRIGGS. Is it not in that statement now?

Mr. DAY. I truly do not know.

Mr. BRIGGS. I think you have it all in those sheets—all I can give you.

Mr. DAY. The expense bills contain all?

Mr. BRIGGS. There is no use in giving you the total of the cars, because you have that there now.

Mr. DAY. The expense bills will show the total number of cars?

Mr. BRIGGS. You only want the expense bills on grain? It will show the same as that.

Mr. DAY. I only ask you as to grain.

Mr. BRIGGS. Do you want me to duplicate that statement? You ask as to all the tonnage?

Mr. DAY. I want the total tonnage turned over to you.

Mr. BRIGGS. I will give you both to-morrow.

Mr. DAY. All lines?

Mr. WILLIAMSON. Do you want it from the Lake Shore and Baltimore and Ohio?

Mr. DAY. I want the total tonnage of the Nickel Plate from other roads, whatever it is, whatever lines it came by. Some of this traffic that was turned over to your road was consigned by C., H. & Co. Do you know who C., H. & Co. are?

Mr. BRIGGS. Carrington, Hanna & Co.

Mr. DAY. Had they an elevator here?

Mr. BRIGGS. No, sir.

Mr. DAY. Do they operate an elevator?

Mr. BRIGGS. No, sir; not in Chicago.

Mr. DAY. Or at Chicago junction points?

Mr. BRIGGS. I do not know whether they do or not at Chicago. I do not think they do.

Mr. DAY. At any of the Chicago junction points, so called?

Mr. BRIGGS. They have one at Kankakee.

Mr. DAY. Does your road extend to Kankakee?

Mr. BRIGGS. No, sir.

Mr. DAY. Have you had business relations with Carrington, Hanna & Co. respecting traffic?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Do you know F. J. Ely?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Where does Mr. Ely reside?

Mr. BRIGGS. I do not know his residence, but his office is in Chicago.

Mr. DAY. Where is his office?

Mr. BRIGGS. Chicago, on Pacific avenue.

Mr. DAY. What is his occupation?

Mr. BRIGGS. Grain dealer.

Mr. DAY. Broker?

Mr. BRIGGS. I presume you would consider him a broker—no, shipper—he buys and ships his own grain.

Mr. DAY. Ships his own grain?

Mr. BRIGGS. Yes, sir; buys it and ships it.

Mr. DAY. And the Chicago-O'Neil Company?

Mr. BRIGGS. At South Chicago; their elevator.

Mr. DAY. You have had business relations with them?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Who operates the Union Elevator?

Mr. BRIGGS. I do not know.

Mr. DAY. Do you know a concern called Snydiker, Fyfe & Co.?

Mr. BRIGGS. I do not know them.

Mr. DAY. Do you know the published tariff rates to the seaboard which prevail over your line, the published rates which your line has published to the seaboard during the past three or four months?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Have you offered at any time to take freight—grain or its products—to the seaboard at less than the tariff rates?

Mr. BRIGGS. Absolutely, I have not.

Mr. DAY. Have you instructed anybody else to do it?

Mr. BRIGGS. I have not.

Mr. DAY. Has any agent within your jurisdiction offered that on behalf of your line?

Mr. BRIGGS. He has not.

Mr. DAY. Has any traffic been carried for any of those people I have named?

Mr. BRIGGS. Not to my knowledge.

Mr. DAY. At less than the published tariff rates?

Mr. BRIGGS. Not to any knowledge of mine.

Mr. DAY. Have you any information to that effect?

Mr. BRIGGS. I have none.

Mr. DAY. Where is it weighed?

Mr. BRIGGS. The property weighed?

Mr. DAY. That you carry east?

Mr. BRIGGS. If you transfer it through an elevator it would be weighed in the transfer elevator at Stony Island. If it came out of an elevator it would be weighed out of the elevator.

Mr. DAY. What is the transfer elevator at Stony Island?

Mr. BRIGGS. It is the one I spoke of this morning.

Mr. DAY. How is it operated?

Mr. BRIGGS. It is operated by Harry D. Chase, who does the transferring for our road. We transfer all of our grain through that elevator.

Mr. DAY. Do you pay any other transfer service than that?

Mr. BRIGGS. No, sir.

Mr. DAY. Now, when it is transferred he makes the weights for you?

Mr. BRIGGS. The board of trade have a weighmaster at that elevator who certifies to the weight. The buyer of the grain settles with the seller on that weight. It is the official board of trade weight.

Mr. DAY. Now, the weight which the elevator man gives to you, how is that evidenced; is it a certificate; does he certify that car number so and so on your road contains so many pounds of corn, or whatever the commodity?

Mr. BRIGGS. We have a system of elevating which is probably as fine as any in the country. The Western car comes to our elevator—we would have a Western car, for instance—loaded with grain. We have what we call the hopper process. The entire contents of that car is dumped into the scale and weighed accurately to an ounce. The grain is then transferred to one of our cars. The board of trade inspector is there and certifies to the in-weight and to the out-weight. He is a disinterested party entirely.

Mr. DAY. He does that in writing?

Mr. BRIGGS. He gives a certificate.

Mr. DAY. You get your certificate?

Mr. BRIGGS. We are not interested in it at all. We keep a record in the office. It is the seller and buyer who are interested in the weights.

Mr. DAY. You take the weights of the official weigher for all goods?

Mr. BRIGGS. Yes, sir.

Mr. DAY. In all instances, do you insert that as the weights?

Mr. BRIGGS. That is billed as the weight of the car.

Mr. DAY. Both in the bill of lading and the waybill?

Mr. BRIGGS. Yes, sir; in both.

Mr. DAY. Has any instance occurred on your line within your observation or within the scope of your information during the year 1897 where different weights have been expressed in the bills of lading than those expressed in the waybills?

Mr. BRIGGS. Never to my knowledge.

Mr. DAY. When settlements are made on traffic going East over your line, are they made on the basis of what is expressed in the waybill or bill of lading?

Mr. BRIGGS. The bill of lading is an exact copy, as far as the weight is concerned, of the waybill. They tally; they agree.

Mr. DAY. They ought to.

Mr. BRIGGS. They always do.

Mr. DAY. Do you know of any instance of underbilling?

Mr. BRIGGS. I do not.

Mr. DAY. Or false billing of any kind?

Mr. BRIGGS. I do not think it would be possible to do it.

Mr. DAY. Or rebates?

Mr. BRIGGS. Or rebates.

Mr. DAY. You do not know of any; have not heard of any?

Mr. BRIGGS. No, sir.

Mr. DAY. Do you know of any advantage that any shipper has had over your line over any other shipper?

Mr. BRIGGS. I do not.

Mr. DAY. In respect to the transportation of grain?

Mr. BRIGGS. I do not.

Mr. DAY. Or flour?

Mr. BRIGGS. Or flour.

Mr. DAY. When you carry flour coming from the West billed, say, to points west of trunk-line territory—what is your flour rate to Buffalo, say?

Mr. BRIGGS. Twelve and one-half cents.

Mr. DAY. What is your wheat rate?

Mr. BRIGGS. Twelve and one-half cents.

Mr. DAY. When you carry wheat to New York by way of Buffalo, what is your division of the haul?

Mr. BRIGGS. We get approximately 54 per cent of the rate.

Mr. DAY. From the point of origin?

Mr. BRIGGS. Of the proportion accruing east of Chicago, if on a through rate.

Mr. DAY. You get 54 per cent?

Mr. BRIGGS. Approximately. That is not accurate, because the divisions vary by the different routes, according to the mileage, one being longer or shorter than another.

Mr. DAY. Then, take the domestic rate from Chicago to New York, approximately you get 54 per cent of that?

Mr. BRIGGS. Of 20 cents.

Mr. DAY. Suppose it came from the Mississippi River and the rate was 23 cents?

Mr. BRIGGS. The proportion east of Chicago would be 19 cents, of which we would receive approximately 54 per cent of the 19.

Mr. DAY. Where you get this percentage, it is on the proportion east of Chicago?

Mr. BRIGGS. Yes, sir. The rate from the Mississippi River is divided as follows: The rate being 20 cents from Chicago, the rate from the river being 23, there is a 3-cent terminal at New York deducted. That leaves 20 cents. The Western roads get 20 per cent, which would leave 19 east of Chicago.

Mr. DAY. And if it came from the Missouri River, would it be any different?

Mr. BRIGGS. There would be no difference; it only runs to the Mississippi River.

Mr. DAY. Minneapolis takes the Mississippi River rate?

Mr. BRIGGS. No, sir.

Mr. DAY. What rate does it take?

Mr. BRIGGS. Agreed rates.

Mr. DAY. What is the agreed rate?

Mr. BRIGGS. On what?

Mr. DAY. On flour.

Mr. BRIGGS. Thirty cents to New York, of which the Western lines get 10 and the Eastern lines 20.

Mr. DAY. You mean 10 cents?

Mr. BRIGGS. Yes, sir; and the local rate from Chicago.

Mr. DAY. And you get what percentage of that?

Mr. BRIGGS. To New York?

Mr. DAY. Yes, sir.

Mr. BRIGGS. Approximately 54 per cent.

Mr. DAY. Have you had an export rate on wheat?

Mr. BRIGGS. We have not; only on corn.

Mr. DAY. Here is a shipment of flour from the Washburn-Crosby Milling Company to New York where the statement is made that your rate is 8.6 cents. Does that mean to New York from here, or is that the amount the Nickel Plate receives?

Mr. BRIGGS. Where is that waybill from—Chicago?

Mr. DAY. Lockwood.

Mr. BRIGGS. That is the proportion east of Lockwood.

Mr. DAY. Where is Lockwood?

Mr. BRIGGS. That is about 20 miles from here, almost on the State line between Illinois and Indiana.

Mr. DAY. On what road is Lockwood?

Mr. BRIGGS. It is on our line; one of our stations. It is our junction with the Chicago, Hammond and Western.

Mr. DAY. What is the proportion of the rate that the Chicago, Hammond and Western receives?

Mr. BRIGGS. Eight per cent.

Mr. DAY. Is that 18.6 cents there the Chicago rate to the seaboard, or is that the Lockwood rate to the seaboard?

Mr. BRIGGS. It is the proportion of the Minneapolis rate accruing east of Lockwood.

Mr. DAY. Does Chicago take the Lockwood rates?

Mr. BRIGGS. Yes, sir.

Mr. DAY. In and out?

Mr. BRIGGS. In and out.

Mr. DAY. You treat it as you do Chicago?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Are you able to state whether the back charges on that traffic of $68.40 were paid by your company, or whether it was prepaid?

Mr. BRIGGS. Does it show there as back charges?

Mr. DAY. It shows what the back charges were.

Mr. BRIGGS. Then it was not prepaid. We paid the Chicago, Hammond and Western.

Mr. DAY. Who made the actual payments in these instances?

Mr. BRIGGS. It is made by joint account settlement, monthly or weekly, through the auditor's office.

Mr. DAY. Your offices are at Cleveland?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Does the local agent pay the balance for the Chicago, Hammond and Western or was the payment made from your general office at Cleveland?

Mr. BRIGGS. They make it through the auditor's office. We deliver them traffic and they deliver us traffic and the joint balance shows the amount, and it is paid through the auditor.

Mr. DAY. How does he know as to business transferred between your road and the Chicago, Hammond and Western?

Mr. BRIGGS. From our office.

Mr. DAY. Your local agents do not settle by balances, then?

Mr. BRIGGS. I think our local agent in Chicago does.

Mr. DAY. But not as to the Chicago, Hammond and Western?

Mr. BRIGGS. I think not. I think that is done through the auditor.

Mr. DAY. You have a local agent at Lockwood?

Mr. BRIGGS. Yes, sir; I do not think he settled. I think that is done through the auditor.

Mr. DAY. Which one makes these settlements? Have you more than one?

Mr. BRIGGS. No.

Mr. DAY. What is his name?

Mr. BRIGGS. J. P. Curry.

Mr. DAY. You were aware, I suppose, of the movement of this flour over your line from the Chicago, Hammond and Western?

Mr. BRIGGS. I have no particular knowledge of it.

Mr. DAY. Were you aware how that was going that way?

Mr. BRIGGS. I might have noticed it, and I might not have. We are receiving business from them every day.

Mr. DAY. These waybill figures—C. H. & W., W. B. F., 322—what does that mean—W. B. F.?

Mr. BRIGGS. That is Chicago, Hammond and Western waybill.

Mr. DAY. F there indicates what?

Mr. BRIGGS. It is a series. Some company's waybill reference.

Mr. DAY. Do you have anything at all to do with the negotiation for this traffic; did you have anything to do with it?

Mr. BRIGGS. No, sir.

Mr. DAY. Do you know who had?

Mr. BRIGGS. No, sir.

Mr. DAY. Have you made any arrangement, engagements, respecting the interchange of traffic with the Chicago, Hammond and Western officials, or any of them?

Mr. BRIGGS. No, sir.

Mr. DAY. Or with any of these milling companies?

Mr. BRIGGS. No, sir.

Mr. DAY. The Consolidated Milling Company, the Washburn-Crosby Milling Company, or the Pillsburg-Crosby Company?

Mr. BRIGGS. None of them.

Mr. DAY. Or any of their agents?

Mr. BRIGGS. No, sir.

Mr. DAY. Nothing at all to do with this particular traffic?

Mr. BRIGGS. Nothing whatever.

Mr. DAY. Have any of your subordinates had anything to do with that flour traffic?

Mr. BRIGGS. Not that I know of.

Mr. DAY. Never heard anything as to that; have no information as to that?

Mr. BRIGGS. No, sir.

Mr. DAY. Have you any information as to who of the officials of the Nickel Plate have had to do with that?

Mr. BRIGGS. I do not know.

Mr. DAY. Did you make any arrangements respecting it?

Mr. BRIGGS. I do not know of any arrangements or anybody who had anything to do with it.

Mr. DAY. There is a very considerable traffic here that went over your route billed to Knox or Hancock & Co., Philadelphia. Do you know anything about that traffic—how it came to go that way?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Did you have anything to do with procuring it?

Mr. BRIGGS. Yes, sir.

Mr. DAY. With whom did you make the engagement?

Mr. BRIGGS. I solicited the business from Carrington, Hanna & Co., and they gave it to us and it was carried at the tariff absolutely.

Mr. DAY. Did they enjoy any consideration for giving it to your road?

Mr. BRIGGS. They did not.

Mr. DAY. How did that reach your road?

Mr. BRIGGS. It reached us at Knox.

Mr. DAY. Is Knox a station on your line?

Mr. BRIGGS. Yes, sir. It is the connection with the I. I. I.

Mr. DAY. How did it reach your line? What elevator did it come out of?

Mr. BRIGGS. It came out of Carrington & Hanna's elevator at Kankakee.

Mr. DAY. That is on the line of the road that delivers to you?

Mr. BRIGGS. Yes, sir.

Mr. DAY. You carried that on a through rate from Kankakee?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Kankakee enjoys the benefit of Chicago rates?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Gets what is called Chicago junction point rates?

Mr. BRIGGS. Yes, sir.

Mr. DAY. Was that export traffic?

Mr. BRIGGS. So far as I know, it was. I think it went to Philadelphia, did it not?

Mr. DAY. Yes, sir; it was so billed. What representations were made to you as to the destination of the traffic?

Mr. BRIGGS. Not any.

Mr. DAY. What was the conversation you had with the Carrington & Hanna firm, or any of their agents respecting it?

Mr. BRIGGS. They told me they had sold corn to Hancock & Co., at Philadelphia. I asked them to give it to our route and they said they would.

Mr. DAY. No inducement proceeded from you or your company to them?

Mr. BRIGGS. Absolutely, none whatever.

Mr. DAY. Was not that rather an awkward way to carry it to Philadelphia?

Mr. BRIGGS. It is the only route we have to Philadelphia.

Mr. DAY. The only route you have?

Mr. BRIGGS. And as good as any other.

Mr. DAY. Is it as direct?

Mr. BRIGGS. Yes, sir.

Mr. DAY. You turn it over to the Lehigh?

Mr. BRIGGS. The Lehigh and the Philadelphia and Reading.

Mr. DAY. Was that carried by your road or billed by you, or was it by one of these fast freight lines?

Mr. BRIGGS. It went by one of the fast freight lines. It would have to go by one of the fast freight lines.

Mr. DAY. It would have to go that way?

Mr. BRIGGS. Yes, sir.

Mr. DAY. I understood you could bill it through.

Mr. BRIGGS. I said we could not bill anything through except on fast freight line divisions.

Mr. DAY. Then you will not take traffic tendered to the Nickel Plate line without billing it over one of the fast freight lines?

Mr. BRIGGS. The Nickel Plate is the fast freight line.

Mr. DAY. The New York, Chicago and St. Louis?

Mr. BRIGGS. We have no local divisions. We have line divisions over all our line routes.

Mr. DAY. Your through arrangements for through rates and through routing and through billing——

Mr. BRIGGS. Is all a matter for the fast freight lines.

Mr. DAY. The principal carrier does not participate in that. The principal—the New York, Chicago and St. Louis—as a corporation, does not participate in that. It is done by these outside lines. That is auxiliary?

Mr. BRIGGS. It is not; you do not grasp it.

Mr. DAY. I think probably I do not.

Mr. BRIGGS. We have local divisions with all connections west of Buffalo. That is what we term local business. For anything going east of the western termini, that is fast freight line business, and we have no divisions over those lines for that business—the Nickel Plate fast freight line, the Traders' Dispatch, the Lackawanna, and the Interstate Dispatch fast freight line. We use those divisions. The Nickel Plate road sends it as though we had divisions locally, though we have not.

Mr. DAY. You do not get as much as though it was carried and you delivered it at Buffalo?

Mr. BRIGGS. No; because it is a through rate; certainly not.

Mr. DAY. Now, then, if grain is offered to the New York, Chicago and St. Louis Railroad here for Philadelphia, you would not bill it through excepting by fast freight line? You would not issue the bill of lading on your road?

Mr. BRIGGS. No, sir; because we have no divisions?

Mr. DAY. What company is the P. W. F. M. Co.? It is a consignor of a large quantity of flour?

Mr. BRIGGS. It is the Pillsbury-Washburn Milling Company.

Mr. DAY. Did you have anything to do with that traffic?

Mr. BRIGGS. Nothing whatever.

Mr. DAY. Now, this Carrington & Hanna traffic that we have just

been referring to that went by your road. You say they enjoyed no advantage whatever by shipping that way?

Mr. BRIGGS. I make that statement, positively.

Mr. DAY. They paid as much and had the same advantage as they would have had if they had sent it over the Lake Shore?

Mr. BRIGGS. No more and no less than they would get by any line running via Buffalo. They gave it to me because I solicited the business.

Mr. DAY. You did not offer any special inducements for the traffic?

Mr. BRIGGS. As a rule. I think I do not have to.

Mr. DAY. Do you do that?

Mr. BRIGGS. I do not do anything but solicit the business.

Mr. DAY. You do not offer any inducements?

Mr. BRIGGS. I do not.

Mr. DAY. You offer nothing of value, like free transfer, free switching, absorbing of a portion of a rate, or any service of that kind?

Mr. BRIGGS. Nothing of that kind.

Mr. DAY. This appears to have gone by the Traders' Dispatch, this Carrington & Hanna business; what cars was that carried out in?

Mr. BRIGGS. I do not recall—I do not remember.

Mr. DAY. If you will furnish the data you have been asked for, Mr. Briggs, that is all I shall ask for to-day.

Mr. BRIGGS. To-morrow will be time enough?

Mr. DAY. Yes, sir; if you will furnish it in the morning. I will ask you one other question before you go. I do not know but what I have covered it this morning. These auxiliary agencies—these line agents—who are under your supervision, or assistants of yours, have they offered any inducements to shippers, or to any shipper, to bill traffic over your road?

Mr. BRIGGS. They have not.

Mr. DAY. If they had done so would it be a matter that would come to your notice in the necessary course of your business?

Mr. BRIGGS. I think it would.

Mr. DAY. Or if they had made any promises?

Mr. BRIGGS. If they had made any promise I think I would know it.

Mr. DAY. Do you do business on the board of trade?

Mr. BRIGGS. I do. I am a member of the board of trade.

Mr. DAY. Have you at any time during this year offered any inducements of a pecuniary nature or a valuable character to a shipper as an inducement to him to ship traffic over your route?

Mr. BRIGGS. Most positively I have not.

Mr. DAY. Not been a party to anything of the kind?

Mr. BRIGGS. Not been a party to anything of the kind.

Mr. DAY. You have no information that it has been done?

Mr. BRIGGS. I have no information that it has been done.

Mr. DAY. Over your route?

Mr. BRIGGS. Or any other route.

Mr. DAY. That is all. I will call Mr. Howe.

L. BRIGGS recalled.

Mr. BRIGGS. You asked me to show the number of cars received from the Baltimore and Ohio road. I give you that: Amounted to 363 cars from February 26 to May 18, 1897, showing the rate from the point of origin. Now, of the proportion of the subdivision east of Chicago the New York, Chicago and St. Louis road received to Painesville, Ohio, on Baltimore business, 44.5 per cent; on Washington, 46.5 per

cent; on Philadelphia, 41 per cent; on New York, 35 per cent of the subdivision east of Chicago.

Mr. DAY. What was the subdivision east of Chicago?

Mr. BRIGGS. I mean by that, if it was local business—grain, for instance, to Baltimore would be 18 cents.

Mr. DAY. Of the rate from Chicago east?

Mr. BRIGGS. If it was an 18-cent local rate from Chicago, we would receive 44.5 per cent of that rate. If from the river the proportion east of Chicago was less than the local rate, we would still receive the same proportion of the subdivision east of Chicago.

Mr. DAY. I see.

Mr. BRIGGS. Now, you asked for the expense bill of that traffic. I don't really feel justified in giving you this. They are all legitimate, and you can examine them if you wish to, but they are not the records of my office. They are the original records of our local agent, and our local agent is in Washington, and I hardly feel justified in giving you the records of his office. I must insist that they go back into his office.

Mr. DAY. So far as that is concerned, I should return them to you, anyhow, Mr. Briggs.

Mr. BRIGGS. They are not the records of my office. I have asked our local agent for them. There is nothing in here that is not in there, as a matter of fact [referring to papers handed Mr. Day].

Mr. DAY. Mr. Briggs, you have the expense bills that come to your road—that traffic received from your western connections?

Mr. BRIGGS. I have here the traffic received from the Baltimore and Ohio Railroad, which you asked for yesterday, and then you asked for the expense bill on freight, for instance, that shows that the car came to us from the Union Elevator. The Baltimore and Ohio got it at the Union Elevator and gave it to us. There is no rate except the $1 back charges. You will find we billed it out and it went to Baltimore. It is billed out at 17 cents.

Mr. DAY. You paid the Baltimore and Ohio the dollar?

Mr. BRIGGS. Yes, sir. We billed it at tariff rates.

Mr. DAY. The traffic that comes to you from the Indiana, Illinois and Iowa or the Elgin, Joliet and Eastern or the Chicago, Hammond and Western or Chicago, Indiana and Western, in all instances is there a documentary description of that car accompanying it?

Mr. BRIGGS. Yes, sir.

Mr. DAY. What is the paper that comes to your road?

Mr. BRIGGS. An expense bill such as this.

Mr. DAY. The same as that?

Mr. BRIGGS. Yes, sir. At Lockwood, where we connect with the Chicago, Hammond and Western, the local agent would return an expense bill with the car, showing through rate and division.

Mr. DAY. I will endeavor to return those to you before I leave town, Mr. Briggs, so that you may return them.

Mr. BRIGGS. You will promise me that faithfully?

Mr. DAY. I will endeavor to conform with your wishes.

Mr. BRIGGS. Our agent is away and he may jump all over me when he returns.

Mr. DAY. Now, I want you to produce, also—you might write this down so you will get it exact—all of the expense bills which accompanied grain or flour or any grain product received by your line from the Chicago, Hammond and Western between January 1 and March 15, destined for Atlantic Seaboard or intermediate points.

The CHAIRMAN. That is, intermediate points between Chicago and the seaboard?

Mr. DAY. Yes, sir; intermediate points between Chicago and the seaboard.

Mr. BRIGGS. As a matter of fact, I have no jurisdiction over the Chicago, Hammond and Western traffic.

Mr. DAY. I know that.

Mr. BRIGGS. I have no power by which to get the expense bills. Our attorney is here, and you might make that request of him.

Mr. WILLIAMSON. I will ask for them.

Mr. BRIGGS. I can not get them, Judge; they are not within my jurisdiction.

Mr. DAY. They are in the office of your local agent?

Mr. BRIGGS. No, sir; in the office of our local agent which is 20 miles east of here.

Mr. DAY. All the traffic coming via the Hammond and Western went to Lockwood and was rebilled from Lockwood?

Mr. BRIGGS. Yes, sir. I presume they are kept in Lockwood. That is a matter that our general freight agent would have to decide.

Mr. WILLIAMSON. I will ask the general freight agent.

The CHAIRMAN. In whose possession are they?

Mr. DAY. The local agent at Lockwood.

The CHAIRMAN. What was his name?

Mr. BRIGGS. I don't remember his name.

(The statement submitted by Mr. Briggs is hereto annexed and marked Exhibit 3.)

(Exhibit 3, referred to in the testimony of Mr. Briggs, is a long tabulated statement, being a description of 365 cars, containing 15,000,000 pounds of freight, mostly grain, turned over to the New York, Chicago and St. Louis Railway Company by the receivers of the Baltimore and Ohio Railway Company.)

A. P. BIGELOW, a witness, having been duly sworn, testified as follows:

Mr. DAY. State your official relations to the Baltimore and Ohio Railroad Company?

Mr. BIGELOW. General Western freight agent.

Mr. DAY. What is your jurisdiction?

Mr. BIGELOW. Chicago and the West.

Mr. DAY. How far west—the entire West?

Mr. BIGELOW. Yes, sir.

Mr. DAY. State the general scope of the work in your charge?

Mr. BIGELOW. The solicitation and handling of the freight traffic.

Mr. DAY. The making of contracts in respect to traffic?

Mr. BIGELOW. The securing of freight, making of contracts.

Mr. DAY. Did you see the answer in this case filed by your road?

Mr. BIGELOW. I did not.

Mr. DAY. Did you see the schedule made up showing the traffic?

Mr. BIGELOW. I did not.

Mr. DAY. You had nothing at all to do with the making of that?

Mr. BIGELOW. Nothing.

Mr. DAY. Do you know who did?

Mr. BIGELOW. I do not.

Mr. DAY. You do not know whether the work was done at Chicago?

Mr. BIGELOW. I do not.

Mr. DAY. Were you consulted in regard to the reply that was to be made to the order of the commission?

Mr. BIGELOW. I was not.

Mr. DAY. Who is the local agent at Chicago of the Baltimore and Ohio?

Mr. BIGELOW. We have no officer with that title.

Mr. DAY. Well, who is the local man at Chicago who performs the work usually looked after by the local agent of a railroad in a great city?

Mr. BIGELOW. T. E. Wayman.

Mr. DAY. What is the extent of his duties—stating it generally—or what are his duties?

Mr. BIGELOW. He handles the accounts, looks after the freight-house work, the outside yard, the transfer of grain, and all that pertains to the physical side of the work.

Mr. DAY. Does he make settlements with the connecting carrier that delivers traffic to you where the charges follow the traffic?

Mr. BIGELOW. I believe in cases of switching accounts he does, but I am not absolutely positive in regard to that.

Mr. DAY. What relation does he sustain to your office. Is he a subordinate of yours?

Mr. BIGELOW. Yes, sir; to the extent that he handles the freight traffic in connection with the details.

Mr. DAY. Does he make contracts, or has he made contracts since you have held the office that you now hold, for through traffic—traffic from the West destined for the seaboard or intermediate points?

Mr. BIGELOW. He does not make any contracts at all.

Mr. DAY. Does he make contracts in relation to traffic originating at Chicago; for example, grain or the products of grain in storehouses or elevators?

Mr. BIGELOW. That is not supposed to be his function. He may do it as he runs across it accidentally.

Mr. DAY. If he has done so it is an accidental case?

Mr. BIGELOW. Yes, sir.

Mr. DAY. How long have you occupied your present official position with the Baltimore and Ohio?

Mr. BIGELOW. Under the receivers, since May 1, 1896.

Mr. DAY. Do you make contracts, or have you during the past year, for grain—the transportation of grain or the products of grain from Mississippi River points or points west of there to points east of Chicago?

Mr. BIGELOW. What do you mean by the term "contracts?"

Mr. DAY. Well, engaging to transport the traffic named or to participate in it, either with the shipper directly or a shipper's agent, or through another carrier?

Mr. BIGELOW. Yes, sir; I have.

Mr. DAY. You were requested to bring some documents with you here to-day, Mr. Bigelow. Did you bring any documentary evidence?

Mr. BIGELOW. I did not bring what you asked for.

Mr. DAY. I asked if you brought any?

Mr. BIGELOW. I brought some through waybills.

Mr. DAY. What do those bills embrace—what traffic do they embrace?

Mr. BIGELOW. Grain products.

Mr. DAY. Grain and grain products?

Mr. BIGELOW. No grain.

Mr. DAY. During the first three months of the current year, the present year, did your road receive any grain from the Chicago, Hammond and Western Railroad?

Mr. BIGELOW. I think not, Mr. Day.

Mr. DAY. Do the papers you brought cover all the traffic, either grain or grain products, that came to your road by way of the Chicago, Hammond and Western?

Mr. BIGELOW. No, sir.

Mr. DAY. What do those papers cover; what traffic do they cover?

Mr. BIGELOW. Grain products to Baltimore.

Mr. DAY. What other traffic of the description named have you expense bills or waybills or through bills for that was received from the Chicago, Hammond and Western by your road other than those you have here?

Mr. BIGELOW. I wish you would repeat that question.

Mr. DAY. What other traffic destined to what other points—I speak now of grain and its products—have you expense bills or waybills or through bills for in your possession other than those you have here?

Mr. BIGELOW. I have none in my possession other than those I brought here.

Mr. DAY. What traffic did your road receive from the Chicago, Hammond and Western that is not covered by these bills during the period mentioned?

Mr. BIGELOW. A multiplicity of products.

Mr. BOND. Mr. Day means grain and grain products.

Mr. BIGELOW. I do not think we had a pound of the traffic to New York or Philadelphia. We may have had some scattering shipments to other points, perhaps to intermediate points. These bills cover it, with a possible few exceptions.

Mr. DAY. This subpœna asks for the original expense bills for grain and the products of grain received by the Baltimore and Ohio from the Chicago, Hammond and Western during the period named.

Mr. BIGELOW. It asks for all expense bills.

Mr. DAY. You have brought these papers in response to this subpœna?

Mr. BIGELOW. No; I brought them purely as a matter of courtesy to you, Mr. Day, for the reason that your subpœna asks for something which does not exist

Mr. DAY. When traffic was turned over to your road during this period by the Chicago, Hammond and Western road, what papers—what documentary evidence—accompanied the traffic?

Mr. BIGELOW. Through waybills.

Mr. DAY. Is this the only paper that accompanied this particular car of traffic [reading from paper produced by witness]—Illinois Central, I. C.—80?

Mr. BIGELOW. It was of course accompanied by what is known as a memorandum waybill, or car card, tacked on the side of the car.

Mr. DAY. And no other paper?

Mr. BIGELOW. No other paper.

Mr. DAY. Do you understand that to be the uniform practice with the Chicago, Hammond and Western in delivering traffic to other connecting carriers?

Mr. BIGELOW. I can not answer as to any other company. That is our practice.

Mr. DAY. Now, the papers that were called for—what was intended to be covered were the papers that accompanied each car of grain or the products of grain that your road received from the Chicago, Hammond and Western during the period of time mentioned in the subpœna.

Mr. BIGELOW. You have them before you [referring to package of papers handed to Mr. Day by witness].

Mr. DAY. These, you say, cover only the traffic that went to Baltimore?

Mr. BIGELOW. For the simple reason that they were the only ones accessible to me at the time. These waybills pass from the point of shipment to destination, and go into the archives of the agent at destination. In order to get all these bills, we should have to gather them up at considerable expense and time to bring them to you here. These bills were available at Baltimore, although I will not assert that I have brought all of them. Some of them may have been lost in the Baltimore office.

Mr. DAY. Why did you limit it to traffic destined to Baltimore?

Mr. BIGELOW. As we recall, there was no traffic to New York. I have no recollection of any.

Mr. DAY. Or Philadelphia?

Mr. BIGELOW. Or Philadelphia. You may find some isolated cases of grain products to New York. If you desire the same data on the New York traffic, we will be very glad to obtain it for you.

Mr. DAY. The commission desired all the documentary evidence that accompanied traffic or related to traffic that came to your road from the Chicago, Hammond and Western between January 1 and the date mentioned in the subpœna, and these papers that you have brought relate only to that which went to Baltimore?

Mr. BIGELOW. Yes, sir.

Mr. BOND. Witness has stated that if any went to other places it was only isolated shipments.

Mr. DAY. When traffic was delivered during this period to your road by the Chicago, Hammond and Western, or coming from the Chicago, Hammond and Western, your agent received a paper or papers describing the traffic and the back charges?

Mr. BIGELOW. Our agent where?

Mr. DAY. At Chicago.

Mr. BIGELOW. No, sir.

Mr. DAY. He did not?

Mr. BIGELOW. No, sir.

Mr. DAY. Did your agent keep any book account of the traffic received?

Mr. BIGELOW. Only a car record. Your question related to Chicago, Hammond and Western business, did it not?

Mr. DAY. Yes, sir.

Mr. BIGELOW. I answered that.

Mr. DAY. When there were back charges accompanying the traffic, who settled; what officer of your road made the settlement with the Chicago, Hammond and Western for those back charges—charges which followed the traffic?

Mr. BIGELOW. Under the system of waybilling it is an auditor's settlement.

Mr. DAY. The local agent did not keep any record of that?

Mr. BIGELOW. No, sir.

Mr. DAY. There was no adjustment of those accounts between your local agent and the—what do you say the title of your man is?

Mr. BIGELOW. Freight agent.

Mr. DAY. Your freight agent and the agent of the Chicago, Hammond and Western?

Mr. BIGELOW. No, sir.

Mr. DAY. Do you know the agent of the Chicago, Hammond and Western Railroad at Hammond or Whiting?

Mr. BIGELOW. Not personally.

Mr. DAY. Where does your road connect with the Chicago, Hammond and Western?

Mr. BIGELOW. At Whiting, Ind.

Mr. DAY. All traffic delivered to your road from the Chicago, Hammond and Western direct is delivered at Whiting?

Mr. BIGELOW. At Whiting.

Mr. DAY. This waybill, Series B, 21, car No. 9050, Chicago, St. Paul and Kansas City road—were there back charges following that traffic [handing paper to witness]?

Mr. BIGELOW. Yes, sir.

Mr. DAY. What was the amount of it?

Mr. BIGELOW. $24.88. It shows on the bill.

Mr. DAY. Where was that settlement made with the Chicago, Hammond and Western for that traffic?

Mr. BIGELOW. With the Baltimore and Ohio, or the Chicago Great Western.

Mr. DAY. The Baltimore and Ohio. Who made it and where was the settlement made with the Chicago, Hammond and Western? Did you account to the Chicago, Hammond and Western for the $24.88 back charges, or the Chicago Great Western?

Mr. BIGELOW. The Chicago, Hammond and Western.

Mr. DAY. Where?

Mr. BIGELOW. Presumably through the auditor's office, under the established custom on through bills.

Mr. DAY. Here is an expense bill, No. 97, L. N. A. & C., consignment of flour from Minneapolis to Cincinnati, Ohio. I will ask you to look at that [handing paper to witness]. Under any circumstances, during the first three or four months of this year, did your road receive documents from the Chicago, Hammond and Western like that?

Mr. BOND. Do you refer to this traffic? I think you would save trouble and time, Mr. Day, if we had it understood that questions which do not especially include other traffic refer only to the traffic under consideration.

Mr. DAY. I refer to grain and grain products, irrespective of point of origin or destination, unless I state otherwise.

Mr. BIGELOW. We may have received a waybill of this description for grain or the products of grain going to some points off the Baltimore and Ohio road, where the system of through billing does not prevail.

Mr. DAY. Have you seen bills like this before from the Chicago, Hammond and Western road?

Mr. BIGELOW. Never.

Mr. DAY. Do you know of any other road extending from Chicago east, connecting with the Chicago, Hammond and Western, that consigns its billing to papers of the description you brought here?

Mr. BIGELOW. I do not.

Mr. DAY. I will state to you, for your information, Mr. Bigelow, that my recollection of the testimony at Chicago of the Chicago, Hammond and Western officer was that this was what they call an expense bill, and accompanied all the traffic which they delivered to connecting carriers on the east. They stated, further, that the expense bill contained substantially or all that the waybill contained, and some data in addition to that.

Mr. BIGELOW. I do not so understand it.

Mr. DAY. And as a matter of fact from all the roads, I think all without exception that extend east of Chicago, connecting at Chicago

with the Chicago, Hammond and Western road, have turned over to the commission expense bills like these.

Mr. BIGELOW. If they have delivered such documents to the Baltimore and Ohio road it is the first time I knew of it.

Mr. DAY. Are you able to state that these through waybills cover all the traffic destined for Baltimore that your road received from the Chicago, Hammond and Western from January 1 to what date—March 15?

Mr. BIGELOW. March 15. I am not sure that those cover it all; no, sir.

Mr. DAY. Will you send to the commission or produce to the commission all of the bills, whether they are expense bills or waybills for grain or grain products, that your road received from the Chicago, Hammond and Western during the period covered by this inquiry?

Mr. BIGELOW. If, as you state, the Chicago, Hammond and Western delivers to the Baltimore and Ohio Railroad the transfer bill, such as that you have exhibited to me, it will be a very simple matter for us to produce all that information; but, as I stated before, I never knew that they ever surrendered such a document under the through waybill system.

The CHAIRMAN. And then you have already made the additional statement, as I understand, that all this grain has been carried under that system?

Mr. BIGELOW. We commenced the through waybilling system last November.

Mr. DAY. I infer, and I think it was so specifically stated, that there were three systems of billing traffic—there was the through bill and there was the waybill, each road having its own waybill independently of whether the traffic was through billed; and then there was the expense bill, which the delivering road turned over to the receiving road with each consignment of traffic, and these are what were called the expense bills. They were described as expense bills by the officers testifying on behalf of the Chicago, Hammond and Western and the officers of the receiving roads leading out of Chicago, and from your testimony I am led to believe that if these did not exist on your road your road is the exception to the rule and the only exception that I am aware of.

Mr. BIGELOW. I qualified as intelligibly as I could that if the Chicago, Hammond and Western performed the superfluous labor of sending to our agent at Whiting an expense bill when they go to the trouble to make a through waybill, I do not understand why they do it. That is the object of the through bill, to avoid this unnecessary labor.

Mr. DAY. I ask you, Mr. Bigelow, will you produce to the commission or send to the commission promptly the bills, whether they be waybills, expense bills, or through bills, for all traffic which you received—which your road received—from the Chicago, Hammond and Western between the dates of, say, January 1 and April 1.

Mr. BIGELOW. If they exist at Whiting Station, expense bills of that form which have been delivered to us by the Chicago, Hammond and Western road, yes, sir; we will send them to you.

Mr. DAY. That is not responsive to my question.

Mr. BIGELOW. I will endeavor to produce all the documents bearing on the question.

Mr. DAY. How soon may we expect them?

Mr. BIGELOW. It may take some time to gather them.

The CHAIRMAN. We understand you to say that as to what Mr. Day

calls expense bills that you receive from that road, and which have their right place at Whiting—those you will produce if they exist?

Mr. BIGELOW. Yes, sir.

The CHAIRMAN. And as to the others, you will do what you can to gather them up?

Mr. BIGELOW. That is the idea exactly.

Mr. DAY. If the expense bills do not exist, Mr. Bigelow, with your return of the other bills, of whatever character they may be, please accompany your return with the names and addresses of the agents from whom you receive the through bills, or whatever you call the bills. Do you know Mr. Banks?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Chance?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Whitehead?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Who is the receiver for the Chicago and Northern Pacific?

Mr. BIGELOW. I do not know.

Mr. DAY. Who do you do business with with respect to traffic that comes to you from the Chicago and Northern Pacific?

Mr. BIGELOW. Henry S. Hawley, general agent.

Mr. DAY. At Chicago?

Mr. BIGELOW. At Chicago.

Mr. DAY. The Chicago and Northern Pacific is in the hands of receivers, is it not?

Mr. BIGELOW. I declare I do not know.

Mr. DAY. What are Mr. Hawley's initials?

Mr. BIGELOW. Henry S.

Mr. DAY. How long has he been acting for that road?

Mr. BIGELOW. I do not know.

Mr. DAY. For what period of time can you state?

Mr. BIGELOW. About a year.

Mr. DAY. Now, in dealing for traffic on that road you had your relations with Mr. Hawley?

Mr. BIGELOW. What dealings I have had with that road I had with Mr. Hawley.

Mr. DAY. You know Mr. Whitehead?

Mr. BIGELOW. Yes, sir.

Mr. DAY. You have had business relations with Mr. Whitehead?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Do you know a man by the name of Corse?

Mr. BIGELOW. I do not.

Mr. DAY. Or Gallagher?

Mr. BIGELOW. Well, I know several Gallaghers?

Mr. DAY. Well, a shipper.

Mr. BIGELOW. I know several of them.

Mr. DAY. Of flour, for example?

Mr. BIGELOW. State definitely the Gallagher you mean.

Mr. DAY. The Gallagher who represented the Minneapolis concern.

Mr. BIGELOW. Yes, sir; I know him.

Mr. DAY. What is his first name?

Mr. BIGELOW. He is commonly called "Harry." I do not know his initials.

Mr. DAY. Do you know Mr. Corse, representing a Minneapolis concern?

Mr. BIGELOW. I do not.

Mr. DAY. During the past six months or, say, during the four or five months prior to April 1, did you have in your service, or did the Baltimore and Ohio have in its service, that you know of, agents to whom you paid commissions on traffic that was turned over to you—soliciting agents, for example.

Mr. BIGELOW. We have no such representatives working on commissions.

Mr. DAY. Did you pay commissions to anybody during the first four or five months prior to April 1 on traffic turned over to the Baltimore and Ohio?

Mr. BIGELOW. I did not.

Mr. DAY. Did the Baltimore and Ohio?

Mr. BIGELOW. Well, the Baltimore and Ohio is a very large system.

Mr. DAY. I am asking so far as your information goes.

Mr. BIGELOW. The Baltimore and Ohio did not.

Mr. DAY. Did you, acting for or in behalf of the Baltimore and Ohio receivers or the Baltimore and Ohio road—when I speak of the Baltimore and Ohio I mean both the receivers and the company, or either—did you make any engagements with anybody to pay commissions on traffic that was routed by the Baltimore and Ohio line?

Mr. BIGELOW. I did not.

Mr. DAY. Have you any information that agreements or engagements of that nature were made with anybody on behalf of the Baltimore and Ohio management?

Mr. BIGELOW. I have not.

Mr. DAY. Have you any reason to believe that commissions were paid to anybody?

Mr. BIGELOW. I have no reason to believe that they were paid.

Mr. DAY. Or that engagements were made with anybody to pay them commissions on traffic routed by your line or part of your line?

Mr. BIGELOW. No.

Mr. DAY. Or any engagements made with another railroad or other railroad officials, officers, or agents to contribute to the payment of commissions or bonuses or rebates on traffic?

Mr. BIGELOW. I have no such information.

Mr. DAY. Have you any information of engagements made to pay commissions or claims by way of rebate, or to secure traffic over your route or a part of your line by contributing through another corporation or to any other individual in respect to that traffic?

Mr. BIGELOW. I have no such information.

Mr. DAY. In the traffic that comes to your road by way of the Chicago, Hammond and Western, for example, what portion of the through rate did your road contribute to the Chicago, Hammond and Western—take this bill for example, B— 22—, car 21203?

Mr. BIGELOW. Eight per cent.

Mr. DAY. Eight per cent of the through rate?

Mr. BIGELOW. From Hammond to Baltimore.

Mr. DAY. Do you know whether your road paid that 8 per cent to the Chicago, Hammond and Western?

Mr. BIGELOW. I presume they did.

Mr. DAY. Who would know? Who has knowledge of those transactions?

Mr. BIGELOW. Those settlements are made on what are known as the auditor's settlement.

Mr. DAY. Which auditor?

Mr. BIGELOW. The auditor of revenue.

Mr. DAY. What is his name—who is the auditor of revenue of your road?

Mr. BIGELOW. W. B. Booth is the general auditor.

Mr. DAY. Do you remember who the auditor of revenue is?

Mr. BIGELOW. He is.

Mr. DAY. When you said the auditor of revenue, you meant the general auditor?

Mr. BIGELOW. The general auditor.

Mr. DAY. Where is J. L. Davis assistant agent?

Mr. BIGELOW. At South Chicago.

Mr. DAY. There is a stamp on this waybill which reads "B. & O. R. R., January 16, 1897; J. L. Davis, assistant agent." What does that mean?

Mr. BIGELOW. It means that he received that waybill.

Mr. DAY. Does that mean the traffic accompanied it?

Mr. BIGELOW. No, sir.

Mr. DAY. What evidence does your officer have that the traffic was received?

Mr. BIGELOW. Only the waybill.

Mr. DAY. What does this stamp "E" indicate?

Mr. BIGELOW. I do not know.

Mr. DAY. Did you ever make, in respect to any of this traffic that was carried—that your road received from the Chicago, Hammond and Western road—any arrangement, any agreement, tacitly or expressly, with any of the officials of the Chicago, Hammond and Western to shrink out a portion of the through rate for the benefit of the traffic or the benefit of the shipper of the traffic, or any agent or other person?

Mr. BIGELOW. I did not.

Mr. DAY. Have you information that anybody connected with the Baltimore and Ohio did that?

Mr. BIGELOW. I have not.

Mr. DAY. Have you any reason to believe that that was done?

Mr. BIGELOW. I have not.

Mr. DAY. Or anything of that nature?

Mr. BIGELOW. No.

Mr. DAY. Is it your belief, Mr. Bigelow, that the full rate, as expressed in these bills, was actually received by your road and retained by it?

Mr. BIGELOW. So far as I know, it was.

Mr. DAY. I will ask if that is your belief.

Mr. BIGELOW. That is my belief.

Mr. DAY. Have you any information that any of this traffic that was carried over your road or any part of your road enjoyed a lower rate of transportation in any part of its journey than the then lawful published tariff rate?

Mr. BIGELOW. I have no such information.

Mr. DAY. Have you had any conversation with Mr. Whitehead in regard to the shipment of flour from Minneapolis, any portion of which was expected to be routed your way?

Mr. BIGELOW. Not that I recall. I may have had a conversation with him in regard to flour shipments passing over our road, but I do not recall it.

Mr. DAY. Or grain shipments?

Mr. BIGELOW. No, sir.

Mr. DAY. Has Mr. Whitehead, during the six months, or any other official—anybody representing the Chicago, Hammond and Western—approached you, endeavoring to secure concessions in the transporta-

tion of traffic which was proposed to be routed by the Baltimore and Ohio, wholly or in part?

Mr. BIGELOW. They have not.

Mr. DAY. Has anybody during that period approached you and asked you for concessions?

Mr. BIGELOW. Undoubtedly they have.

Mr. DAY. Have you agreed to any?

Mr. BIGELOW. I have not.

Mr. DAY. Tacitly or otherwise, have you consented in any way to such concessions?

Mr. BIGELOW. I have not.

Mr. DAY. Have any of your subordinates, so far as you know?

Mr. BIGELOW. They have not.

Mr. DAY. Have any of your superiors, so far as you are informed?

Mr. BIGELOW. So far as I am informed, they have not.

Mr. DAY. Do you wish the commission to understand you as stating that so far as your information goes all traffic that has been carried over the Baltimore and Ohio, or any portion of it, has paid the full, the lawful, the published tariffs, and that that money has been retained by the Baltimore and Ohio?

Mr. BIGELOW. I wish to be so understood.

Mr. DAY. And no concessions or rebates or preferences have been granted in respect to any of the traffic during this period?

Mr. BIGELOW. I wish to be so understood.

Mr. DAY. You state that out of the through rate from Hammond or Whiting to the East, to the Atlantic Seaboard, the Chicago, Hammond and Western received 8 per cent?

Mr. BIGELOW. Yes, sir.

Mr. DAY. What does it receive, or what did it receive during this period, on intermediate traffic?

Mr. BIGELOW. That would depend entirely on its destination.

Mr. DAY. Well, say Pittsburg.

Mr. BIGELOW. Speaking from memory, 20 per cent.

Mr. DAY. Have you any information of traffic having been brought through from the Mississippi or Minneapolis or St. Paul on a through bill, and at an intermediate point being rebilled to intermediate points?

Mr. BIGELOW. I have no such information.

Mr. DAY. Have you any reason to believe that that was done?

Mr. BIGELOW. I certainly have no reason to believe it.

Mr. DAY. You have not heard that intimated in respect to the traffic which your road participated in?

Mr. BIGELOW. Unqualifiedly no.

Mr. DAY. And you have no reason to believe that it was done?

Mr. BIGELOW. No, sir.

Mr. DAY. Have you any reason to believe that intermediate traffic was carried either in whole or in part on the proportion of the through rate?

Mr. BIGELOW. There has been no such manipulation of the rates.

Mr. DAY. Has there been any false billing in respect to any of the traffic your road has participated in?

Mr. BIGELOW. Positively none.

Mr. DAY. Any traffic coming from the Mississippi River that you could control, or points west of the Mississippi river—you say your jurisdiction extends as far west as the Pacific Ocean—now, traffic that comes from points west of the Mississippi River that you could control, how would you route it to, say, Philadelphia or Baltimore?

Mr. BIGELOW. From the point of origin?

Mr. DAY. Yes, sir; or from the Mississippi River.

Mr. BIGELOW. We do not control it.

Mr. DAY. I say, suppose you could. You say you make contracts. Suppose you make contracts with the shipper. How would you route from the Mississippi River, say?

Mr. BIGELOW. I do not know of any such case, Mr. Day.

Mr. DAY. Is the Baltimore and Ohio Southwestern a part of the system over which you exercise some jurisdiction?

Mr. BIGELOW. It is not.

Mr. DAY. Who does sustain the relation to the Baltimore and Ohio Southwestern which you sustain to the Baltimore and Ohio?

Mr. BIGELOW. I can not answer that.

Mr. DAY. You have no knowledge or information?

Mr. BIGELOW. I do not know.

Mr. DAY. I am asking now for your information.

Mr. BIGELOW. I am answering the question honestly; I do not know.

Mr. DAY. Do you know J. F. Harris & Co.?

Mr. BIGELOW. I do not.

Mr. DAY. Or any of the members of that concern?

Mr. BIGELOW. I do not.

Mr. DAY. Do you know Shearer, of St. Louis?

Mr. BIGELOW. I do not.

Mr. DAY. Do you have anything to do with traffic coming from Burlington or East Burlington—through the gateway of Burlington or East Burlington, transferred at Beardstown for Baltimore?

Mr. BIGELOW. I have not.

Mr. DAY. Have you had any relation at all to that traffic?

Mr. BIGELOW. None whatever.

Mr. DAY. Or made any contracts or engagements with anybody in respect to that traffic?

Mr. BIGELOW. Never.

Mr. DAY. Who is your immediate superior, Mr. Bigelow?

Mr. BIGELOW. Mr. C. S. Wight.

Mr. DAY. Give his title, please.

Mr. BIGELOW. Manager of freight traffic.

Mr. DAY. Where is his office?

Mr. BIGELOW. At Baltimore.

Mr. DAY. Who is his immediate superior?

Mr. BIGELOW. I presume the receivers.

Mr. DAY. Is there any traffic manager between Mr. Wight and the receivers; any traffic man who exercises superior control over traffic to Mr. Wight?

Mr. BIGELOW. Not that I know of.

Mr. DAY. Which of the receivers manages the traffic department?

Mr. BIGELOW. I do not know that I can answer that. I am not informed as to the functions of the receivers.

Mr. DAY. Have you had any instructions or any correspondence with either of your superior officers respecting the securing of traffic, making concessions to secure it, or to participate in concessions?

Mr. BIGELOW. No.

Mr. DAY. None?

Mr. BIGELOW. None.

Mr. DAY. Or the giving of rebates?

Mr. BIGELOW. Have I not just answered that?

Mr. DAY. Well, I just put it in a different form.

Mr. BIGELOW. I have had no such correspondence.

Mr. DAY. Have you had any conversation with either of your superiors, or any of your superiors, respecting rebates or concessions, or the giving of preferences or any inducement to secure traffic?

Mr. BIGELOW. I have not.

Mr. DAY. Has anyone that you know of—any of the people who are subordinate to you or who sustain any relations to you—had such conversations, that you know of?

Mr. BIGELOW. No.

Mr. DAY. Do you have any elevators or storehouses on the line of your road that are controlled by your road?

Mr. BIGELOW. Within what territory?

Mr. DAY. Within your jurisdiction?

Mr. BIGELOW. No.

Mr. DAY. At Chicago or Chicago common points?

Mr. BIGELOW. None.

Mr. DAY. Or junction points?

Mr. BIGELOW. None.

Mr. DAY. Or anywhere else?

Mr. BIGELOW. There may be on the line of the road; I do not know where they are.

Mr. DAY. You do not know of them?

Mr. BIGELOW. I do not.

Mr. DAY. Who pays the cost of transferring grain or the products of grain which your road received during the first three months of this year from Western connections or connections transferring to your cars?

Mr. BIGELOW. I can not answer that.

Mr. DAY. You do not know?

Mr. BIGELOW. I do not know.

Mr. DAY. You do not know what the rule is in respect to it?

Mr. BIGELOW. Are you referring to grain we transfer from car to car?

Mr. DAY. That is one way; how about that?

Mr. BIGELOW. We do that with our own men and pay our own men in the usual way.

Mr. DAY. You do that wherever the grain is transferred from car to car?

Mr. BIGELOW. Yes, sir; and the men are paid for it as I am paid for my services.

Mr. DAY. You have not had any relations with the owners, consignors, or consignees of the grain to make an allowance for the transfer?

Mr. BIGELOW. We could not have, as we perform the labor ourselves.

Mr. DAY. Do you make any allowance for transferring from elevators into your cars?

Mr. BIGELOW. We make an allowance if the grain is cleaned, clipped, or manipulated in that way in passing through private elevators.

Mr. DAY. What allowance?

Mr. BIGELOW. My recollection is $1.50 on oats and $1.25 on grain.

Mr. DAY. Where cleaned, clipped, or manipulated?

Mr. BIGELOW. Where it is put through the process peculiar to a cleaning house.

Mr. DAY. You do that in the case of grain that your road carries out of Chicago to the East?

Mr. BIGELOW. We do where it passes through an elevator.

Mr. DAY. And that without reference to how it got into the elevator

or whose grain it was when it went into the elevator? I mean, here is an elevator containing 500,000 bushels of grain you want to carry to the East. Now, independently of what road brought it to that elevator or whose grain it was when it went into the elevator, do you in all cases make that allowance?

Mr. BIGELOW. No.

Mr. DAY. In what instances do you make the allowance?

Mr. BIGELOW. We take the grain and put it into a private elevator and take it out again.

Mr. DAY. Grain coming from the West?

Mr. BIGELOW. All grain comes from the West.

Mr. DAY. Well, you do not bring it from the West?

Mr. BIGELOW. No, sir.

Mr. DAY. State fully the circumstances.

Mr. BIGELOW. Where a Western railroad brings to our yard 10 car loads of grain for transfer at a private elevator we take the 10 cars in and place 10 of our own cars alongside the elevator. When these identical 10 cars of grain are cleaned and manipulated it is loaded into these 10 Baltimore and Ohio cars, and $1.50 on oats and $1.25 on corn is charged for the labor of making the transfer.

Mr. DAY. Why do not you transfer that yourself? You say you have facilities for doing it?

Mr. BIGELOW. We have no clipping or cleaning facilities.

Mr. DAY. Do you make that allowance in any instance where the grain is not clipped or cleaned?

Mr. BIGELOW. We do not.

Mr. DAY. Is that a uniform allowance to everybody?

Mr. BIGELOW. So far as I know.

Mr. DAY. What shippers at Chicago enjoy that advantage or privilege; to whom, in other words, have you made this allowance?

Mr. BIGELOW. To the elevators; we do not make it to the shippers.

Mr. DAY. You were speaking of private elevators?

Mr. BIGELOW. In distinction from what are known as public elevators, where the allowance is not made.

Mr. DAY. What particular elevators have you done that for in the last three months?

Mr. BIGELOW. Wherever any work of that kind has been performe .

Mr. DAY. Can not you name some of them?

Mr. BIGELOW. If I were to name some of them, if I were to be absolutely correct, I would name every one of them, if I could.

Mr. DAY. Well, you can name some.

Mr. BIGELOW. I think we have allowed it to Pratt, Requa, the Calumet; I think there is another elevator called Little's; there may be others.

Mr. DAY. Is Pratt's elevator on the line of your road?

Mr. BIGELOW. No, sir.

Mr. DAY. It is on the Wabash road?

Mr. BIGELOW. I believe it is.

Mr. DAY. Do you allow it to Carrington & Hanna?

Mr. BIGELOW. If they put any grain in our possession to pass through an elevator to be manipulated. Let me go back and correct a statement made. I believe I said this allowance was made on corn, did I not?

Mr. DAY. Yes, sir.

Mr. BIGELOW. I guess my first statement was correct in regard to

that, although I am a little in doubt as to the correctness of that being applicable on corn.

Mr. DAY. Have you made any agreements with shippers respecting transfer charges?

Mr. BIGELOW. The shipper has no interest in the transfer charges.

Mr. DAY. I am asking.

Mr. BIGELOW. No, sir.

Mr. DAY. Have you made any agreement with shippers by which they receive anything of value—any money, service, or anything else—from your road other than the transportation charges, the published transportation rates?

Mr. BIGELOW. I have not.

The CHAIRMAN. You mean anything in reduction?

Mr. DAY. Yes, sir; that would tend to reduce it, whether a switching charge or the remitting of car demurrage, remitting storage or the payment of storage which the shipment would otherwise have to pay.

Mr. BIGELOW. I have made no such arrangement.

Mr. DAY. Do you know of any such arrangement made on behalf of the company or road you represent?

Mr. BIGELOW. I do not.

Mr. DAY. Or in which it has participated?

Mr. BIGELOW. I do not.

Mr. DAY. Or whether arrangement was made by another officer?

Mr. BIGELOW. I do not.

Mr. DAY. Have you made any arrangement with any shipper or anybody acting for a shipper or for any corporation that would tend to reduce the cost of transportation below the local published rates, whether the traffic was carried by your road or any other road?

Mr. BIGELOW. I have not.

Mr. DAY. You say you have been acting for the receivers since the road went into the hands of receivers, in 1896 some time?

Mr. BIGELOW. I have been employed by the Baltimore and Ohio Railroad, and am presumably acting for the receivers.

Mr. DAY. I thought I repeated substantially your answer. If you have no relations with the receivers, I would like to have you state that.

Mr. BIGELOW. I presume I am serving the receivers.

Mr. DAY. Are you paid for your services by the Baltimore and Ohio Railroad Company, or the receivers of the Baltimore and Ohio Railroad Company? I only want to know what your relations to the receivers are—whether you are a servant of the receivers or not.

Mr. BIGELOW. I think Mr. Bond better answer that question.

Mr. BOND. Oh, yes, sir; he is, of course.

Mr. DAY. You had something to do, Mr. Bigelow, with the turning over to the New York, Chicago and St. Louis road some traffic during the first three months of this year. Just state now what you did in relation to that.

Mr. BIGELOW. I turned over some east-bound traffic to them.

Mr. DAY. State what you did in regard to it. Commence at the beginning and run through and tell the whole story.

The CHAIRMAN. You mean, how he came to turn it over?

Mr. DAY. Yes, sir; how he came to do it, and what he did in pursuance of it.

Mr. BIGELOW. You want to know the reasons leading up to it?

Mr. DAY. Just tell the whole thing, the whole transaction—what it was, what led up to it, what you did, and how you did it?

Mr. BIGELOW. I will state my understanding of it. As I understand it, the trunk lines engaged in some strife for traffic tacitly agreed that there should be some kind of restraining influence or some material manifestation of sincerity and good faith toward one another, and agreed, if I may put it that way, that they would confine their tonnage to within certain limits. The Baltimore and Ohio simply exceeded its proportion, and in order to establish the fact that it was maintaining the rates and acting in good faith, and as material evidence of that, it turned some of its east-bound traffic over to the New York, Chicago and St. Louis road.

Mr. DAY. What was the Baltimore and Ohio's limit?

Mr. BIGELOW. As I recall it, about 8 per cent.

Mr. DAY. What percentage had it carried at that time?

Mr. BIGELOW. I do not recall.

Mr. DAY. Well, approximately.

Mr. BIGELOW. I can not recall that even approximately.

Mr. DAY. How did you know it had exceeded its limit?

Mr. BIGELOW. I knew at the time.

Mr. DAY. How did you obtain that information?

Mr. BIGELOW. I presume by statistics which were prepared by the association.

Mr. DAY. What association?

Mr. BIGELOW. The Central Freight Association. They maintained, as you know, a statistical bureau.

Mr. DAY. Was it a part of your work at Chicago to apportion the traffic—to divide the traffic?

Mr. BIGELOW. To divide what traffic?

Mr. DAY. This traffic you have been speaking of.

Mr. BIGELOW. Traffic of the Baltimore and Ohio road?

Mr. DAY. Yes, sir.

Mr. BIGELOW. I do not know that it was part of my work; I did it in this case.

Mr. DAY. How did you come to do it?

Mr. BIGELOW. I have just stated that I ascertained that the road was in excess, and I did it.

Mr. DAY. How did you ascertain that it was in excess?

Mr. BIGELOW. From the statistics.

Mr. DAY. What other information had you?

Mr. BIGELOW. None.

Mr. DAY. No communication in respect to the matter from some superior officer?

Mr. BIGELOW. I may have had. I can not tell you.

Mr. DAY. Do you know how much you turned over to the Nickel Plate?

Mr. BIGELOW. No, sir.

Mr. DAY. Have you any idea?

Mr. BIGELOW. I can only guess—entirely from memory; probably 3,000 or 4,000 tons.

Mr. DAY. I do not remember what you said was the purview of your work, your jurisdiction. What was your work? What were you to do there for the Baltimore and Ohio Railroad? What were your general duties?

Mr. BIGELOW. Well, I think it would be almost an impossibility for me to answer that.

Mr. DAY. What was your chief duty?

Mr. BIGELOW. I have no chief duty, except to look after the general interests of the Baltimore and Ohio.

Mr. DAY. What do they cover?

Mr. BIGELOW. Such a multiplicity of affairs——

Mr. DAY. Will you give the chief object of maintaining your office in Chicago and maintaining you in Chicago?

Mr. BIGELOW. The managing of the soliciting force and clerical force.

Mr. DAY. Soliciting what?

Mr. BIGELOW. All classes of business for shipment over the road, both east and west bound; the proper conduct of the outlying offices, and a general supervision over all that relates to the traffic of the Baltimore and Ohio, passing through that gateway.

Mr. DAY. Was a part of your duty the turning away, the giving up, of business you had secured?

Mr. BIGELOW. It became my duty, if those conditions prevailed.

Mr. DAY. I ask now how it became your duty?

Mr. BIGELOW. I do not believe I can answer you how it became my duty.

Mr. DAY. Well, Mr. Wight—is that your superior's name?

Mr. BIGELOW. C. S. Wight.

Mr. DAY. Did you receive any advice from Mr. Wight directing you to turn over this traffic to another competing road?

Mr. BIGELOW. I do not recall that I received any specific instructions from him.

Mr. DAY. Did you receive any instructions, verbally or in writing?

Mr. BIGELOW. Not that I recall; I may have.

Mr. DAY. Did you have any correspondence with him in reference to it?

Mr. BIGELOW. Not that I recall.

Mr. DAY. Did you advise him what you had done?

Mr. BIGELOW. I do not think so.

Mr. DAY. Did you advise anybody?

Mr. BIGELOW. I do not think I did. The statistics show what was done.

Mr. DAY. What statistics?

Mr. BIGELOW. The statistics on which I made the diversion showed it on the conclusion of the diversion.

Mr. DAY. You mean the Central Traffic Association?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Did they show that you received these several thousand tons of freight at Chicago and that you carried it out and turned it over to a competitor?

Mr. BIGELOW. Yes, sir.

Mr. DAY. What is this statistical document called that shows that?

Mr. BIGELOW. I do not know that it has a special name. It is information promulgated for roads in the association.

Mr. DAY. It shows what one road turns over to another?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Where did you get this traffic?

Mr. BIGELOW. What was diverted?

Mr. DAY. Yes, sir.

Mr. BIGELOW. It is impossible for me to answer that question.

Mr. DAY. Did it come from points back of Chicago?

Mr. BIGELOW. It may have.

Mr. DAY. Do you know?

Mr. BIGELOW. I presume some of it did.

Mr. DAY. Did any originate in Chicago?

Mr. BIGELOW. It may have done so.

Mr. DAY. Do you know?

Mr. BIGELOW. Undoubtedly some of it did.

Mr. DAY. Who did you instruct to turn over this traffic to the Nickel Plate?

Mr. BIGELOW. Mr. Wayman, I believe.

Mr. DAY. How much did you tell him to turn over?

Mr. BIGELOW. No specific quantity.

Mr. DAY. What did you say to him?

Mr. BIGELOW. It is impossible for me to recall.

Mr. DAY. Did you say it to him orally?

Mr. BIGELOW. I believe so.

Mr. DAY. Did you give him any written instructions?

Mr. BIGELOW. I am quite sure I did not.

Mr. DAY. Do you want the commission to understand you as testifying that you received no instructions from any of your superiors in regard to the turning of that freight over to the Nickel Plate road?

Mr. BIGELOW. I do not believe that I so stated. I stated that I could not recall that I received instructions.

Mr. DAY. Or any advices?

Mr. BIGELOW. Or advices.

Mr. DAY. Did you have any conversation with either of the receivers in regard to it?

Mr. BIGELOW. Not that I recall.

Mr. DAY. Telegraphic?

Mr. BIGELOW. No.

Mr. DAY. Letter?

Mr. BIGELOW. No.

Mr. DAY. Or from Mr. Wight?

Mr. BIGELOW. I think not.

Mr. DAY. I will ask you, Mr. Bigelow, when you return to your office to make an examination of your records, so that you may be able to testify specifically in regard to that matter, whether you had any instructions to turn that traffic over, or any traffic over, to the Nickel Plate, or any other road; whether any correspondence passed between you and any of your superiors in regard to it?

Mr. BIGELOW. Well, I must request you in turn to state to me specifically in writing exactly what you want, if you please, so that my memory may be refreshed as to what your wishes are. You have no objection to that, have you?

Mr. DAY. No, sir; I will furnish you a copy of the question. Where does your road connect with the Nickel Plate?

Mr. BIGELOW. At Stony Island.

Mr. DAY. Where is the Union Elevator?

Mr. BIGELOW. It is my impression that it is jointly on the Fort Wayne and the Chicago and Alton tracks.

Mr. DAY. Who operates that elevator?

Mr. BIGELOW. I do not know.

Mr. DAY. Do you know any of the officials connected with it?

Mr. BIGELOW. I may know them, but I do not know who they are.

Mr. DAY. The Chicago O'Neill Company—do you know any of those people?

Mr. BIGELOW. I have no personal acquaintance with anyone connected with that firm.

Mr. DAY. Did you have any conversation with anybody representing the New York, Chicago and St. Louis road, known as the Nickel Plate, in regard to that traffic or any traffic?

Mr. BIGELOW. The diverting of the traffic?

Mr. DAY. Yes, sir.

Mr. BIGELOW. I believe I said something to Mr. Briggs on the subject.

Mr. DAY. Who else?

Mr. BIGELOW. No one else that I know of.

Mr. DAY. What did you say to Mr. Briggs?

Mr. BIGELOW. Speaking from memory, I think I stated to him that we were going to send some business over to his line, or words to that effect.

Mr. DAY. What else?

Mr. BIGELOW. That is all.

Mr. DAY. You did not tell him on what account?

Mr. BIGELOW. It is a fair presumption that he knew on what account.

Mr. DAY. I ask you if you told him on what account.

Mr. BIGELOW. Not that I recall.

Mr. DAY. Had any demand been made upon you by any of the people representing the New York, Chicago and St. Louis road for traffic?

Mr. BIGELOW. None.

Mr. DAY. None at all?

Mr. BIGELOW. No, sir.

Mr. DAY. You wish the commission to understand that you, just of your own volition, voluntarily gave away several thousand tons of traffic?

Mr. BIGELOW. I wish you to understand the matter as I have answered it.

Mr. DAY. I am asking you if you wish the commission to understand that. I have asked you a number of questions as to the source of your authority. Now, I ask you, putting it in another form, whether you acted solely of your own volition, voluntarily, or whether you were acting under the direction of anybody?

Mr. BIGELOW. I acted under what I understood to be the general understanding between the roads in connection with that matter.

Mr. DAY. In giving away this traffic to a competing line did you have the authority of anybody for doing it?

Mr. BIGELOW. I do not know that I had any specific authority bearing directly on the matter. I was familiar with the tacit agreement of the roads interested in the matter.

Mr. DAY. Have you diverted traffic before, since the road went into the hands of receivers?

Mr. BIGELOW. We may have done so. I do not recall now.

Mr. DAY. Do you know of any instance where you gave away traffic that your road had obtained—gave it away to a competitor—since the road went into the possession of Federal receivers, other than the Nickel Plate case?

Mr. BIGELOW. I do not recall any.

Mr. DAY. Are you able to say you did not?

Mr. BIGELOW. No; not offhand.

Mr. DAY. Are you able to say there is a precedent for it?

Mr. BIGELOW. With our company?

Mr. DAY. Yes, sir; representing the Baltimore and Ohio Company, or the Baltimore and Ohio receivers?

Mr. BIGELOW. I do not recall whether there was a precedent or not for the action.

Mr. DAY. Have you had any conversation with either Mr. Cowen or Mr. Murray in regard to the diversion of traffic from the Baltimore and Ohio to a competing line?

Mr. BIGELOW. I may have mentioned the fact.

Mr. DAY. When did you have your conversation with either of them?

Mr. BIGELOW. I have not the faintest idea.

Mr. DAY. When did you see Mr. Cowen last?

Mr. BIGELOW. About a week ago.

Mr. DAY. Prior to that, when had you seen him?

Mr. BIGELOW. The week before that.

Mr. DAY. And prior to that?

Mr. BIGELOW. The week before that.

Mr. DAY. In either of those conversations was this subject mentioned?

Mr. BIGELOW. It was not.

Mr. DAY. Have you had any conversation with Mr. Cowen in regard to this traffic since the 1st of April.

Mr. BIGELOW. I have not.

Mr. DAY. Or with Mr. Murray?

Mr. BIGELOW. I may have had with Mr. Murray, but I do not recall it.

Mr. DAY. If you had a conversation with Mr. Murray, when was it?

Mr. BIGELOW. It would be impossible for me to answer that question.

Mr. DAY. You are not able to say that you did have a conversation with him?

Mr. BIGELOW. I am not able to say definitely. I may have done so.

Mr. DAY. Have you any reason to believe that Mr. Murray knew that you had diverted that traffic?

Mr. BIGELOW. He gets the same statistical information I do.

Mr. DAY. Other than that?

Mr. BIGELOW. He may have.

Mr. DAY. Now, this statistical information you mention, is not that simply a résumé of the traffic started from Chicago over the various lines?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Does it on its face show that you diverted traffic from your road to the Nickel Plate road?

Mr. BIGELOW. I think mention is made of that fact in one of those statements.

Mr. DAY. That is printed?

Mr. BIGELOW. No; it is not printed.

Mr. DAY. Who issued the statement you refer to?

Mr. BIGELOW. J. F. Tucker is the commissioner of the Central Freight Association. I do not know who issued it.

Mr. DAY. Who signed it?

Mr. BIGELOW. I do not know. I do not know that I ever looked at one of the circulars to see who signed it.

Mr. DAY. You saw it mentioned in one of those circulars that this traffic had been diverted from the Baltimore and Ohio to the Nickel Plate?

Mr. BIGELOW. I presume I did.

Mr. DAY. Did you have a conversation with Mr. Wight about it?

Mr. BIGELOW. Not that I recall.

Mr. DAY. At no time?

Mr. BIGELOW. Not that I recall.

Mr. DAY. This traffic that was turned over, can you tell me whether it was—look at this paper [showing the paper to witness], page 34, can you tell from this—it says, "W. B. Local, 454." What does that mean?

Mr. BIGELOW. The waybill, I presume.

Mr. DAY (reading). "February 26, consignor, Union Elevator, order of Snydecker, etc.; notify Gill & Fisher, Baltimore, Md.; wheat 43,000 pounds, waybilled to Painesville; proportion of through rate from Chicago to Baltimore, Md." Can you tell from that inspection whether it was through traffic?

Mr. BIGELOW. I do not know anything about it.

Mr. DAY. I am asking whether, having refreshed your memory from that, whether this originated at Chicago or was through traffic.

Mr. BIGELOW. You are speaking of that on there [referring to paper]?

Mr. DAY. I am speaking of that you turned over to the Nickel Plate.

Mr. BIGELOW. I do not know; possibly it originated at both places.

Mr. DAY. If it came through from the West, would it come through on a through waybill?

Mr. BIGELOW. No; unless it came over some road with which we had through billing arrangements.

Mr. DAY. With what Western road did you have at this time through billing arrangements?

Mr. BIGELOW. Let me go back and answer that question again, and state that none of the traffic came on a through waybill that you have reference to, because we have no through billing arrangements with roads west of Chicago.

Mr. DAY. None?

Mr. BIGELOW. None.

Mr. DAY. Why did you not tell me at the start, if you knew that? We occupied considerable time in getting at that fact.

Mr. BIGELOW. You did not ask me that question. I stated that we had through billing arrangements with the Chicago, Hammond and Western. That is not Chicago; that is Whiting.

Mr. DAY. Is not that a Chicago common point?

Mr. BIGELOW. It takes a Chicago rate—I must have misunderstood you. There was no reason why I should not answer that. If I misled you, you misled me, because I did not understand your question.

Mr. DAY. I understand now that you have through billing arrangements with the Chicago, Hammond and Western, and that road only?

Mr. BIGELOW. I construed your inquiry to mean Chicago proper. It is my impression that we have no through billing arrangements with any other road except the Chicago, Hammond and Western through the Chicago gateway; I think our interchange with the three I's road and the Elgin, Joliet and Eastern is on the same basis, except at Chicago proper.

Mr. DAY. What charges, then, followed this traffic? You say you took it at Chicago and turned it over to the Nickel Plate at Stony Island. What charges followed that?

Mr. BIGELOW. All the charges that came to us.

Mr. DAY. What were they?

Mr. BIGELOW. Whatever the advance charges were of the Western roads, if it originated west of Chicago. If it originated in Chicago, there would probably be no charge except the elevator switching.

Mr. DAY. What Baltimore and Ohio line connects with the Nickel Plate at Painesville?

Mr. BIGELOW. A branch of the Pittsburg and Western road.

Mr. DAY. That is a part of the Baltimore and Ohio system?

Mr. BIGELOW. I can not answer that.

Mr. DAY. What is your information?

Mr. BIGELOW. I do not know anything about it.

Mr. DAY. Now, your line—you had a line extending from Chicago where you took this grain out of the elevator to its point of final destination at Baltimore?

Mr. BIGELOW. Yes, sir.

Mr. DAY. And yet you voluntarily turned over, without any solicitation from the competing line, several thousand tons of traffic—traffic that your rails reached from the point of its origin to the point of its final destination.

Mr. BIGELOW. We turned it over to them without any solicitation of their part.

Mr. DAY. Have you solicited any business or have you offered to carry or agreed or participate in the transportation of traffic coming from points west of Chicago, or coming from Chicago or Chicago Junction points to the Atlantic Seaboard or any intermediate points at less than the then lawful published tariff rate or rates?

Mr. BIGELOW. I have not.

Mr. DAY. Are you acquainted with the firm of Gill & Fisher, or any member of it?

Mr. BIGELOW. I have a very slight acquaintance with—I do not know whether he is a member of the firm or not—one of the gentlemen connected with it.

Mr. DAY. What is his name?

Mr. BIGELOW. Randall.

Mr. DAY. Where does he live?

Mr. BIGELOW. In Baltimore.

Mr. DAY. Are you acquainted with any agent of theirs at Chicago; anybody that purports to represent them?

Mr. BIGELOW. I do not know that they have an agent at Chicago; I never heard of it.

Mr. DAY. Do you know anybody except Randall connected with the concern?

Mr. BIGELOW. I do not.

Mr. DAY. Have you had any conversation with Mr. Randall in regard to concessions below the tariffs filed with the commission?

Mr. BIGELOW. I have not.

Mr. DAY. Or the giving of any preferences to their concern or their traffic?

Mr. BIGELOW. I have not.

Mr. DAY. Or doing for them any service or carrying any traffic free or remitting any charges?

Mr. BIGELOW. No.

Mr. DAY. Or the absorbing of any?

Mr. BIGELOW. No.

Mr. DAY Did they have any warehouse or elevator on the property of the Baltimore and Ohio road?

Mr. BIGELOW. Not that I know of.

Mr. DAY. On a portion of this traffic the waybills or the expense bills which your road turned over to the Nickel Plate with the traffic purport to make the Baltimore and Ohio road the consignor of the freight. Was the Baltimore and Ohio road interested in the property itself?

Mr. BIGELOW. Not in the least.

Mr. DAY. Was the Baltimore and Ohio road or any of its officers, so

far as you are informed, engaged in the grain business or shipping of grain?

Mr. BIGELOW. So far as I know, they are not.

Mr. DAY. There seems to be a hundred cars or more or less of the traffic that you turned over to the Nickel Plate road which are billed as the property of the Union Elevator Company. When you took that traffic from the Union Elevator Company how was it routed?

Mr. BIGELOW. By the Baltimore and Ohio road.

Mr. DAY. Did you have any authority from the consignors to change that and divert it around by another route?

Mr. BIGELOW. No.

Mr. DAY. When you turned it over to the Nickel Plate road, what did you say about turning it back onto the Baltimore and Ohio road at Painesville?

Mr. BIGELOW. What did I say to whom?

Mr. DAY. What did you say to anybody? What direction did you give as to how it should get back to the Baltimore and Ohio road?

Mr. BIGELOW. I presume that I suggested to Mr. Briggs, of the Nickel Plate, that the traffic be surrendered back to us at that point.

Mr. DAY. Why?

Mr. BIGELOW. The Nickel Plate road proper could not make a delivery in Baltimore.

Mr. DAY. They can make a delivery to other roads.

Mr. BIGELOW. Going to Baltimore?

Mr. DAY. Yes, sir.

Mr. BIGELOW. I never heard of it.

Mr. DAY. They can deliver to the Lehigh Valley.

Mr. BIGELOW. That does not go to Baltimore.

Mr. DAY. Their connections go to Baltimore. The traffic could go by other routes—it could go by the Pennsylvania—there were other lines open to him. Why did you direct him to give it over to the Baltimore and Ohio at Painesville?

Mr. BIGELOW. It is the point where we intersect their line.

Mr. DAY. Will you state why the property was billed as the property of the Baltimore and Ohio Railroad?

Mr. BIGELOW. It was not so billed, as I understand it. It is customary on all waybills to indicate the delivering railroad.

Mr. DAY. The bills which were turned over to the commission by the Nickel Plate road at Chicago—the bills for this traffic which your road turned over to them—show on their face the names of the consignor and consignee, the number of the car and the initial of the car as received by them, and under the name of "consignor" it gives the name on a part of this traffic as the Baltimore and Ohio Railroad; under the title of "name of car" it gives the number of car and Baltimore and Ohio road. These were your own documents.

Mr. BIGELOW. It has no significance, so far as it relates to the ownership of the property.

Mr. DAY. Why was Baltimore and Ohio inserted?

Mr. BIGELOW. Simply as an identification to the Nickel Plate.

Mr. DAY. The Nickel Plate already had on that paper the initial of the car, the number of the car, the point at which it received it from you, and that it originated at Chicago. This name of owner was in addition.

Mr. BIGELOW. It does not make any difference. It has no significance in the sense you mean as proprietor of the property.

Mr. DAY. I am not giving a meaning to it. I am asking why the Baltimore and Ohio was put in.

Mr. BIGELOW. We were the delivering line, and, following the custom which prevails when one road transfers to another, we make a transfer bill. Let me ask, in the column which reads "Consignor and consignee," what do you find—"Order of Snydecker, Fife & Co., notify Gill & Fisher?"

Mr. DAY. In some instances.

Mr. BIGELOW. Do you not in every instance?

Mr. DAY. No.

Mr. BIGELOW. It may be a clerical error.

Mr. DAY. No; it occurs too often. Here are two columns where the Union Elevator Company is named as consignor, then the Chicago O'Neill Company is consignor; there are four cars in which the Baltimore and Ohio Railroad is consignor.

Mr. BIGELOW. The Baltimore and Ohio did not know the names of the consignors. It came from Western railroads. For the nonce we were simply consignors.

Mr. DAY. Here are five cars that did not come from Western railroads [referring to paper].

Mr. BIGELOW. Where did it come from?

Mr. DAY. Your bills state that it came from Chicago.

Mr. BIGELOW. I do not know. I have not the data before me. I can explain it when I see that.

Mr. DAY. I may have asked you this question, Mr. Bigelow, before, but I will ask it again. I do not think I put it in this form. Have you had any instructions or any directions from any of your official superiors or from anybody representing the Baltimore and Ohio Company or the receivers at any time since the road has been in the hands of receivers, any directions to get traffic by concessions of any nature or description from the published rates, the lawful published rates filed with the Interstate Commerce Commission?

Mr. BIGELOW. You asked me that question before, but I will answer it again in the negative. No; I have not.

Mr. DAY. Nor any intimation that you were expected to get it?

Mr. BIGELOW. No, sir.

Mr. DAY. That it was required of you?

Mr. BIGELOW. No, sir.

Mr. DAY. And so far as your relations to the traffic transported by the Baltimore and Ohio road are concerned, you believe that you have absolutely complied with the law?

Mr. BIGELOW. So far as my transactions are concerned, did I understand you to say?

Mr. DAY. Yes, sir; in all things.

Mr. BIGELOW. Yes, sir.

Mr. DAY. And that you have not solicited traffic at less than the lawful rates by any agreement, expressed or implied, that favors should be enjoyed on the traffic or on account of the ownership of the traffic?

Mr. BIGELOW. I have not.

Mr. DAY. Do you know of any instances in which car demurrage has been remitted to a shipper or consignee or consignor?

Mr. BIGELOW. I do not recall specifically; there may have been some isolated case where the circumstances seemed to warrant it.

Mr. DAY. Has it occurred in any instances that has come within your information as a concession to a shipper, or on account of shipments of traffic, by means of which the rate of transportation has been lessened?

Mr. BIGELOW. No.

Mr. DAY. Has anybody had free storage?

Mr. BIGELOW. What class of free storage—elevator storage?

Mr. DAY. Any kind where you have charged others under like circumstances or similar circumstances?

Mr. BIGELOW. No, sir; most emphatically no. Our company does not enjoy any facilities that would admit of anything of the kind.

Mr. DAY. Has your company absorbed any switching expenses that would otherwise be charged up against the traffic?

Mr. BIGELOW. Let me understand that question more clearly.

Mr. DAY. Switching expenses follow the traffic the same as other charges, do they not, in instances?

Mr. BIGELOW. Well, you understand, there are many peculiar conditions existing at Chicago where switching is absorbed under natural and existing conditions.

Mr. DAY. As a part of the rate?

Mr. BIGELOW. As a part of the rate.

Mr. DAY. Now, in instances where traffic is switched to or from an elevator, that would be charged for—that would be placed as a burden on the traffic. Have you paid that, or absorbed it, so as to give any shipper, or that particular traffic, the benefit of free switching?

Mr. BIGELOW. No; we have not.

Mr. DAY. By any device whatever, has any shipper obtained a preference, so far as you know, over any other shipper?

Mr. BIGELOW. So far as I know, they have not.

Mr. DAY. Or has any individual or any corporation obtained a preference?

Mr. BIGELOW. So far as I know, they have not.

Mr. DAY. You take the traffic that comes to you through the Chicago and Northern Pacific—that road, whatever its name may be—from the Chicago sugar refinery. What is the switching charge for switching from that sugar refinery to your road?

Mr. BIGELOW. I do not believe that I can recall that, Mr. Day.

Mr. DAY. Has your road paid any proportion of that switching charge, or agreed to?

Mr. BIGELOW. To whom?

Mr. DAY. Well, either to the Chicago Sugar Refining Company or the owner of the traffic, or anybody representing the consignor or the consignee or the owner?

Mr. BIGELOW. No, sir.

Mr. DAY. Or to the Chicago and Northern Pacific? Are you aware that the Chicago and Northern Pacific has acted as intermediary for the payment of it?

Mr. BIGELOW. No.

Mr. DAY. Has any part of it been shrunk out?

Mr. BIGELOW. Not that I know of.

Mr. DAY. Has any of this traffic or any of the traffic carried by your road during the first three months of this year been carried at an export rate differing from the local rate when the traffic was really domestic traffic?

Mr. BIGELOW. No, sir.

Mr. DAY. Have you had any conversation with Mr. Randall respecting concessions on any of the traffic billed to them or consigned to them?

Mr. BIGELOW. None whatever.

Mr. DAY. When did you leave Chicago, Mr. Bigelow?

Mr. BIGELOW. When did I leave Chicago?

Mr. DAY. Yes, sir.

Mr. BIGELOW. About the 20th of May, I think.

Mr. DAY. You have not been to Chicago since?

Mr BIGELOW. No.

Mr. DAY. Have you had any agreement or arrangement or any understanding with Banks, or Chance, or Whitehead for a participation with them, or either of them, in the making of concessions below the published tariff rates for the service actually performed?

Mr. BIGELOW. I have not.

Mr. DAY. Have you had any conversation with either of them upon that subject within the past three months?

Mr. BIGELOW. Not that I recall.

Mr. DAY. Have you had any conversation with anybody purporting to represent the Washburn-Crosby Milling Company in regard to concessions?

Mr. BIGELOW. I have not.

Mr. DAY. Or the Pillsbury-Washburn Company?

Mr. BIGELOW. I have not.

Mr. DAY. Or the Consolidated Company?

Mr. BIGELOW. I have not.

Mr. DAY. Did you with Mr. Gallagher, of Minneapolis?

Mr. BIGELOW. I did not.

Mr. DAY. Has any claim been presented to you or come through your office in regard to the transportation of flour in which your road participated?

Mr. BIGELOW. From whom or where? Is that following that other question?

Mr. DAY. Yes, sir.

Mr. BIGELOW. No such claim was ever presented to me.

Mr. DAY. Has any been presented to anybody that you have any information respecting?

Mr. BIGELOW. No, sir.

Mr. DAY. Have you had any arrangement or agreement or understanding with either of the railroad men that I have named whereby your road was to give them a greater share in the through rate or the Chicago-Atlantic seaboard rate than the 8 per cent you have mentioned?

Mr. BIGELOW. I have had no such conversation with the parties you named.

Mr. DAY. Or with anybody?

Mr. BIGELOW. Or with anybody.

Mr. DAY. Are you informed that any such arrangement or arrangements of that nature have been made with them or anybody representing them?

Mr. BIGELOW. With any of the roads?

Mr. DAY. With any of the roads mentioned.

Mr. BIGELOW. No, sir; I have not.

Mr. DAY. So far as you have heard, the full 8 per cent and no more has been paid to the Chicago, Hammond and Western?

Mr. BIGELOW. So far as I have heard or know.

Mr. DAY. And, so far as you have heard, they have received it and retained it in their treasury?

Mr. BIGELOW. So far as I know or have heard.

Mr. DAY. What is the proportion of the Chicago–seaboard rate that the Elgin, Joliet and Eastern was to have on traffic they turned over to your road?

Mr. BIGELOW. Eight per cent, I believe.

Mr. DAY. And the three I's?

Mr. BIGELOW. I can not answer that specifically. I do not recall it. The divisions are published. Speaking from memory, I think about 16 per cent. That is only a guess.

Mr. DAY. The three I's?

Mr. BIGELOW. Yes, sir.

Mr. DAY. Why should they receive so much more than the others—where do they deliver it to you?

Mr. BIGELOW. At Walkerton, Ind.

Mr. DAY. How far is that east of Whiting, approximately? I am asking for your recollection on that.

Mr. BIGELOW. I might as well be accurate about it. If you have an Official Guide, I can give it exactly. [After examining Official Guide.] About 49 miles.

Mr. DAY. Who is there at Chicago that would have power to make concessions in rates?

Mr. BIGELOW. Who is there at Chicago that would have power to make concessions?

Mr. DAY. At Chicago or the junction points—any of them.

Mr. BIGELOW. No one that has power to do that. I desire to add that if anyone had the power I would.

Mr. DAY. Mr. Bigelow, what is that bill [handing paper to witness] B-19—your number or their number?

Mr. BIGELOW. Their serial number.

Mr. DAY. This appears to be a consignment from Rockford, Ill., to Baltimore, Md., carload of oil cake, 28,000 pounds, 17-cent rate, I. C. car 198. Where is that rate from and to—that 17-cent rate?

Mr. BIGELOW (after examining paper). From High Lawn to Locust Point, Baltimore.

Mr. DAY. The charges were prepaid, were they not?

Mr. BIGELOW. Yes, sir; prepaid. It is in the prepaid column.

Mr. DAY. I think that is all I wish to ask Mr. Bigelow to-day.

Mr. BOND. You will give him a memorandum of what you want him to obtain, Mr. Day?

Mr. DAY. Yes, sir.

The CHAIRMAN. Mr. Bond, do you want to ask him any questions?

Mr. BOND. No, sir; I think not.

At 1 o'clock p. m. the commission adjourned.

JAMES MCCREA, a witness, having been duly sworn, testified as follows:

Mr. DAY. You may state what position you occupy, Mr. McCrea, with the Pennsylvania Company.

Mr. MCCREA. Vice-president of the Pennsylvania Company and the Pittsburg, Cincinnati, Chicago and St. Louis road, generally known as the Pennsylvania lines west of Pittsburg.

Mr. DAY. Will you state what particular branch of the work of the Pennsylvania lines comes under your supervision or jurisdiction?

Mr. MCCREA. As the first vice-president, I represent the president in his absence, and I have supervision over all departments of the lines west of Pittsburg.

Mr. DAY. Who exercises final supervision or control over the auditor or accounting branch of the Pennsylvania lines?

Mr. MCCREA. The third vice-president did. He died about a week ago.

Mr. DAY. What was his name?

Mr. MCCREA. John E. Davidson. At the time I was subpœnaed the marshal also had a subpœna for him, but he was very ill at that time and died a few days afterwards.

Mr. DAY. His successor has not yet been named?

Mr. MCCREA. No, sir.

Mr. DAY. Who is acting now in the supervision of that work?

Mr. MCCREA. The work is divided up at present between the second and fourth vice presidents. There is an ad interim there before the matter will be settled, I presume. The board meeting will hardly be apt to be held until some time in the fall.

Mr. DAY. Who has charge of the contracting for the transportation of traffic from Chicago common points, or junction points, or points west thereof through to the Atlantic Seaboard?

Mr. MCCREA. It is under the general charge of the freight traffic manager, Mr. McCabe.

Mr. DAY. Who is his immediate superior officer?

Mr. MCCREA. He reports to me.

Mr. DAY. If in the transportation, or in respect to the transportation, of traffic over the Pennsylvania lines, any of them, singly or acting together, any concessions were made or have been made in the past six months or eight months from the published tariffs at the time or any preferences have been granted to any individual or corporation in respect to any transportation, under whose jurisdiction would that come?

Mr. MCCREA. It would come through me.

Mr. DAY. And subordinate to you, if any engagements, agreements, or contracts of that nature have been made, who, next below you, would exercise the authority in the premises?

Mr. MCCREA. It would go through the freight traffic manager.

Mr. DAY. You mean if such engagements of that kind had been made they would be made by him or his subordinates?

Mr. MCCREA. Exactly.

Mr. DAY. By him?

Mr. MCCREA. Or his subordinates.

M. DAY. What official relation do you sustain to the Pittsburg, Cincinnati, Chicago and St. Louis road?

Mr. MCCREA. Vice president.

Mr. DAY. You are vice-president?

Mr. MCCREA. Yes, sir.

Mr. DAY. Who is the president?

Mr. MCCREA. Mr. Frank Thomson.

Mr. DAY. Is he president of all the Pennsylvania lines?

Mr. MCCREA. He is president of the Pennsylvania Railroad Company and also of the Pennsylvania lines west. The organizations are separate with the exception of the president.

Mr. DAY. Did you see the answer that was filed by your company in this matter in this case under consideration now—the schedule or the answer?

Mr. MCCREA. Yes, sir.

Mr. DAY. It was made up under your supervision, was it?

Mr. MCCREA. No, sir; just simply under my direction—in a general way, yes, sir.

Mr. DAY. That is what I meant. You were consulted in regard to it?

Mr. MCCREA. The notice was served on me, I think.

Mr. DAY. What relation do you sustain officially to what is known

as the Union Fast Freight Line—the Star Union—what is its corporate name? Is it a corporation?

Mr. McCREA. No, sir; the Star Union Line is simply a bureau through which the business of the Pennsylvania Railroad and the Pennsylvania lines, the through business, the interchange of business, is handled. Originally it was a corporation, and, I think, in 1873 it was bought out and the trade-mark was retained.

Mr. DAY. It is, then, simply an auxiliary agency?

Mr. McCREA. A bureau.

Mr. DAY. Its officers are paid by whom?

Mr. McCREA. The expenses are divided up between the lines east and west of Pittsburg. When I speak of east and west I mean east and west of Pittsburg.

Mr. DAY. The expenses are divided among the lines that compose the Pennsylvania system?

Mr. McCREA. Yes, sir.

Mr. DAY. There are no other corporations that are not auxiliary or part of your system that contribute to the expenses of the Star Union Line?

Mr. McCREA. I think none.

Mr. DAY. The point I desire to get at is to establish that it is one of your agencies.

Mr. McCREA. Yes, sir.

Mr. DAY. Exclusively yours?

Mr. McCREA. Yes, sir; that is right.

Mr. DAY. The Star Union Line has its independent auditor, has it not?

Mr. McCREA. Yes, sir.

Mr. DAY. Generally speaking, what is the purview of his work?

Mr. McCREA. He is practically the head of the clearing house between the two companies—that is, between the lines east and west.

Mr. DAY. Does that agency collect the charges and tolls for the transportation of traffic?

Mr. McCREA. Yes, sir.

Mr. DAY. It does the collecting?

Mr. McCREA. Yes, sir; of course, it is the agency. It is really a very difficult matter to describe.

Mr. DAY. Does the Star Union Line agency actually collect money for the transportation of traffic that goes by that line?

Mr. McCREA. No, sir.

Mr. DAY. Does that agency handle any money of the Pennsylvania companies, or either of them, or any of its auxiliary companies, excepting the salaries of the officers of the Star Union Line?

Mr. McCREA. No, sir; it is just simply an accounting department, from the reports of which the moneys between the companies are divided.

Mr. DAY. If any preference or advantage in the nature of a rebate or any other device is enjoyed or made in respect to traffic by the Star Union Line, is such preference, discrimination, rebate, or advantage made by the officers of that line or any of the agents of that line—the Star Union Line?

Mr. McCREA. No, sir.

Mr. DAY. Then it is purely and simply an auxiliary business agency that does nothing but arrange for the transportation of traffic and keep the book accounts in respect to that with the various lines that make up the Pennsylvania system?

Mr. McCREA. Yes, sir.

Mr. DAY. Do you exercise, or have you exercised in the past eight months, any control over the traffic or the charges finally received for the transportation of traffic east of Pittsburg?

Mr. MCCREA. No, sir.

Mr. DAY. Your jurisdiction is confined to west of Pittsburg?

Mr. MCCREA. Entirely.

Mr. DAY. In the answer and schedules filed by the Pennsylvania system—meaning the entire system, using the word in its broadest sense—it appears that, excepting an infinitesimal quantity, all grain or its products carried by your system went by what is known as the Star Union Line?

Mr. MCCREA. Yes, sir.

Mr. DAY. I did not quite comprehend from the answers made how any of the traffic should go by any other than the Star Union going over the Pittsburg, Fort Wayne and Chicago and the Pennsylvania or the Pan Handle and the Pennsylvania. Can you explain how that comes to be divided up?

Mr. MCCREA. I will try to. In the first place, as I explained, the Star Union Line is a bureau which serves as a clearing house as between the lines east and west of Pittsburg. There was some business that would seek the seaboard perhaps by Columbus—I do not recollect those places, but we will say Columbus—where it may have been delivered to the Norfolk and Western; or Cincinnati, where it might have been delivered to the Chesapeake and Ohio or some other Eastern line; or Louisville, where it would have been delivered to some other connection seeking the seaboard through that gateway. Then, there might be some business delivered to the Western New York and Pennsylvania, at Newcastle, or, in a general way, business could be delivered to a connecting line for the seaboard other than the Pennsylvania Railroad, that would not appear in the records of the Union Line; again, there might be some business that was delivered through an agency which was not a Union Line agency. Most of the important agencies on the line of the road are Union Line agencies as well as purely railroad agencies. Then, it is possible that a mistake of an agent might be made. He might bill on the wrong manifest, and the reports that were made by the Pittsburg, Fort Wayne and Chicago, and the Pittsburg, Cincinnati, Chicago and St. Louis companies, were simply to cover in that class of business that had been forwarded but were not comprised in the Union Line.

Mr. DAY. Does the Star Union Line take traffic destined for Norfolk and Newport News?

Mr. MCCREA. No, sir.

Mr. DAY. Does it take traffic that goes off the rails of the Pennsylvania system, say, for example, traffic for Boston?

Mr. MCCREA. Yes, sir.

Mr. DAY. I understood you to say that you examined this schedule that was made out?

Mr. MCCREA. Well, in a very general way. There were sixty or seventy sheets of it and I just glanced it over, not really enough to say that I understand much about it.

Mr. DAY. In respect to any of the traffic that was carried by the Star Union Line over your rails or by either of the companies of which you are an officer, were any preferences granted to anybody?

Mr. MCCREA. Not to my knowledge?

Mr. DAY. Have you any information on the subject?

Mr. MCCREA. No, sir; I have no information on that subject.

Mr. DAY. Have you any reason to believe that any shipper, any consignor, or any consignee enjoyed any advantage?

Mr. MCCREA. None, sir.

Mr. DAY. Or preference?

Mr. MCCREA. None, sir.

Mr. DAY. If anything of value was paid to or granted to any person in respect to any of this traffic, what officer of the Pennsylvania system would necessarily be informed of it, no matter by what device it may have been done?

Mr. MCCREA. I should say that the traffic manager would, and eventually I would.

Mr. DAY. Have you any information that any commissions to secure traffic have been paid by either of the companies with which you are connected?

Mr. MCCREA. No, sir.

Mr. DAY. Any commissions on account of traffic?

Mr. MCCREA. No, sir.

Mr. DAY. Or any rebates?

Mr. MCCREA. No, sir.

Mr. DAY. Anything in the nature of free storage?

Mr. MCCREA. No, sir.

Mr. DAY. You remember the press reports in regard to rate cutting and general demoralization of rates in February and March of this year?

Mr. MCCREA. Yes, sir.

Mr. DAY. The press—the Chicago press notably, and possibly the New York press, too—made allegations naming certain roads? You perhaps saw those reports?

Mr. MCCREA. No; I did not. The simple fact is that they are always full of it, day in and day out, and I pay very little attention to them.

Mr. DAY. It was alleged that there were certain roads that were not getting the share of the traffic which the officers felt that they ought to receive, and that secret devices were employed for the purpose of securing traffic—devices that were not named in the tariff sheets filed with the commission.

Mr. MCCREA. You can see that once a week: every week the statistics are usually reported; you can see reports of that kind in the paper. It has been so ever since I have known of it.

Mr. DAY. Have you any information that led you to believe that any of your subordinates or any of the officers of the Pennsylvania system were making any concessions to secure traffic?

Mr. MCCREA. No; I have not, sir.

Mr. DAY. It was alleged in some of the papers that after a time the Pennsylvania lines were carrying what was called an abnormal percentage of the traffic going east by way of Chicago gateways. As a result of that, or as a fact, did your system—any of your lines, the lines with which you are connected—turn over to your competitors any portion of your traffic?

Mr. MCCREA. Why, no, sir; under the general percentages which were supposed to be worked out—the balances that are kept of the statistics—we were, I suppose, at the first of the year in the neighborhood of 180,000 tons behind the percentage we were supposed to carry. We received business from other roads on that account.

Mr. DAY. To make up your deficit?

Mr. MCCREA. Yes, sir.

Mr. DAY. What roads?

Mr. McCREA. I do not recall them all now; the Baltimore and Ohio among others. They turned over to us a lot of business.

Mr. DAY. Can you mention any others?

Mr. McCREA. No; because the difficulty with our location is that we are the only two roads that pass through the gateway at Pittsburg, and when either of us get short it is very difficult to even up; that is, to make any such turning over as you speak of. I do not recall that any other road turned over anything to amount to anything—I do not recall it.

Mr. DAY. Approximately, or speaking roughly, from the information you have, what was the extent of the traffic that the Baltimore and Ohio turned over to you?

Mr. McCREA. Really, I can not tell you now; I do not remember.

Mr. DAY. Where was it turned over?

Mr. McCREA. At Chicago.

Mr. DAY. Would you cause a statement to be made and sent to the commission of the time and place and character of the traffic turned over to your road by the Baltimore and Ohio during the year 1897?

Mr. McCREA. Certainly; I do not suppose you want it in detail?

Mr. DAY. I think for the purpose I have in mind that I should like to have the number of cars, the weight in gross, the character of the traffic, and about the time when and where it was turned over by the Baltimore and Ohio.

Mr. McCREA. Perhaps I can give you a little more information; probably enough to avoid that. The business was turned over to us at Chicago—I think it was all at Chicago; possibly some at Chicago Junction points, brought by us to Pittsburg and turned over to the Baltimore and Ohio at that point—turned back to them at Pittsburg. They are the only other east-bound road out of Pittsburg. The Vanderbilts and the Erie have a line, but it would be out of the way to bring it down there and haul it out. They are the only road with which there could be an evening of that kind.

Mr. DAY. Who arranged for that traffic to be turned over to you, Mr. McCrea?

Mr. McCREA. My recollection is that the receiver asked me. He said he was over and we were short, and asked me if I would take it, and I said I would.

Mr. DAY. Who do you mean by the receiver?

Mr. McCREA. Mr. Murray.

Mr. DAY. Of the Baltimore and Ohio?

Mr. McCREA. Yes, sir.

Mr. DAY. Where was that conversation had?

Mr. McCREA. It was not any conversation at all. My recollection is that it was either by letter or telegram.

Mr. DAY. About when?

Mr. McCREA. Very early in the year.

Mr. DAY. Probably the month of February?

Mr. McCREA. I should say in January.

Mr. DAY. During the first two months of this year were you satisfied—were you led to believe—that traffic was being diverted from your rails by preferences granted by some of your competitors?

Mr. McCREA. No; I do not think that I was led to believe that.

Mr. DAY. It was stated that some of your competitors complained that your lines in the months of February and March, possibly April, were carrying what they regarded as an abnormal volume of traffic, and that it was the result of some secret preferences or devices.

Mr. McCREA. Why, I do not recollect the newspaper statements that you have given in a general way exactly as you put them. My recollection was that the statements were that the Pennsylvania lines, or the Pennsylvania, having lived up so religiously to the law, as compared with its neighbors, had suffered so badly they were said to have gone in.

Mr. DAY. That is what I meant—that that was alleged.

Mr. McCREA. Oh, yes, sir; it was all alleged. Those things are alleged always.

Mr. DAY. As a matter of fact, did the Pennsylvania system or any of its auxiliaries, so far as you have any information, secure traffic by granting preferences or advantages to individuals?

Mr. McCREA. No, sir.

Mr. DAY. Or to corporations?

Mr. McCREA. No, sir.

Mr. DAY. Which the general shipping public did not enjoy at that time?

Mr. McCREA. No, sir.

Mr. DAY. After your system acquired a much larger volume of traffic than you had enjoyed earlier in the year did you deliver over to any of your competitors any portion of that?

Mr. McCREA. No, sir; we are behind to day on the evening-up process. We are to-day, I should think, over 50,000 tons behind.

Mr. DAY. Taking the business of the year?

Mr. McCREA. No; taking it from the date when we agreed to even up.

Mr. DAY. Do I understand you to say that if you received now 50,000 tons that would make you good, according to the agreement, or whatever it was?

Mr. McCREA. About that, I should say—I am speaking roughly from memory—the last report I looked at I think was to that effect.

Mr. DAY. Personally have you made any agreements with shippers or the agents of shippers respecting the reduction or increase of tariff charges from Chicago or points west of Chicago to the seaboard to become operative in the future?

Mr. McCREA. No, sir.

Mr. DAY. You probably saw some statements of that kind made also?

Mr. McCREA. No; I did not see any of that kind.

Mr. DAY. Have you made any arrangement or agreement or had a tacit understanding with consignors or shippers or consignees of grain or its products?

Mr. McCREA. No, sir.

Mr. DAY. With a concern known as Bartlett, Fraser & Co., of Chicago?

Mr. McCREA. No, sir.

Mr. DAY. Or Armour?

Mr. McCREA. No, sir.

Mr. DAY. Or Mr. Charles Counselman?

Mr. McCREA. No, sir; the only agreement—I filled a copy with the answer of my agreement with Mr. Counselman; that is for the use of the elevator.

Mr. DAY. Has there been any other agreement, either written or oral, or a tacit understanding with Mr. Counselman than the one you filed?

Mr. McCREA. There was an oral agreement; yes, sir.

Mr. DAY. When was that made?

Mr. McCREA. At the time the contract was made.

Mr. DAY. In respect to what was that agreement?

Mr. McCREA. The contract recites the terms under which he will

operate the elevator, and the transfer charges as recited therein were those that where agreed upon by the roads as being fair, and I volunteered the statement to him that if he could show me that any other railroad was paying more for business transferred in the houses there that I would pay him the same, and he has never made any claim for it or given me any evidence whatever that any of the other railroads did, and nothing hasb een paid to him. 8

Mr. DAY. He has never made any claim?

Mr. MCCREA. Never made any claim.

Mr. DAY. Neither he nor anybody acting in his behalf?

Mr. MCCREA. No, sir; not that I know of.

Mr. DAY. That was made contemporaneously with the signing of the contracts or subsequently?

Mr. MCCREA. Oh, no; it was made at that time. When we decided that the situation had developed so that it was absolutely necessary for us to have an elevator there, and I had a talk with him to know whether he would operate it, and also on what terms, I made the contract, a copy of which I forwarded, and he made the statement that he thought some of the other elevators were operated on more advantageous terms. I volunteered the statement I made to you.

Mr. DAY. Is that the only understanding, tacit or expressed?

Mr. MCCREA. That is all, sir.

Mr. DAY. That has been had between any of the companies you represent, so far as you know, and Mr. Counselman?

Mr. MCCREA. Yes, sir.

Mr. DAY. Has any payment been made to him by any of the companies that you are connected with, by any corporation that you are connected with, or by any of your subordinates other than the amounts named in the written contract?

Mr. MCCREA. No, sir; none.

Mr. DAY. Has he been paid any moneys by any company with which you are connected, or by any of your subordinates, upon any account other than the dollar and dollar and a half actually named in the contract and upon grain actually transferred in that warehouse?

Mr. MCCREA. No, sir. He may have been paid at some other elevator, you know. The same charges are paid there, but no more.

Mr. DAY. Do you allow him transfer charges on grain that is transferred into your cars from other elevators?

Mr. MCCREA. Only as we would anybody else at any other elevator. There is a regular schedule of them.

Mr. DAY. Do you allow all shippers by your lines $1.50 a car on oats?

Mr. MCCREA. I think so. I am not up in the detail of those questions as our agents in Chicago are.

Mr. DAY. Who knows?

Mr. MCCREA. Mr. Randall and Mr. Borner, and those people there. What I want to say to you clearly is, that when it comes to these questions of just how much per car, I have not that information. I have too many subjects generally to keep that detail in mind, but I do want to say that whatever has been paid has been simply that which is current, and that which is proper and authorized.

Mr. DAY. My question went to the point as to whether we were speaking of your contract relations with Mr. Counselman.

Mr. MCCREA. Yes, sir.

Mr. DAY. Whether he received larger transfer charges than other individuals who shipped by your route or routes, or whether he received transfer charges or allowances in instances where another shipper did not?

Mr. McCREA. No, sir; he received just exactly what the contract that is filed with you calls for, and those rates are what would be called the current rates at Chicago.

Mr. DAY. Have you any other elevators or storehouses that are leased to any other shippers?

Mr. McCREA. No, sir.

Mr. DAY. Or do you let any of your grounds to any other shipper or elevator man?

Mr. McCREA. No, sir.

Mr. DAY. This Pennsylvania transfer house—that is the name of it, is it not?

Mr. McCREA. Yes, sir.

Mr. DAY. That stands on your ground?

Mr. McCREA. Yes, sir.

Mr. DAY. Which of your roads built it?

Mr McCREA. It stands on the ground of the Pan Handle road, and is owned by that company. The Fort Wayne Company pays a rental for its use of it?

Mr. DAY. Its use of what?

Mr. McCREA. The business that it gets off. You see we have two roads, and to avoid building two elevators we built one at Fifty-ninth street, where there is a cross connection to the Fort Wayne road. Now, that money for building that elevator and the ground had to be supplied by the Pan Handle Railroad. The tracks and so on that are outside of the elevator, and which are not leased to Mr. Counselman, but belong to the railroad company—the charges for that and the interest on the cost of the elevator itself are charged against the two companies, and the rent received is credited against that, and the balance is divided between them according to the proportion of business done by each in the house.

Mr. DAY. When did you build that elevator?

Mr. McCREA. It was finished about the 1st of January.

Mr. DAY. What is its capacity—its transfer capacity?

Mr. McCREA. My recollection is about 125 cars a day. I am not sure whether that is running day and night or day only.

Mr. DAY. Has it any storage capacity independent of the 125 cars transfer space?

Mr. McCREA. I think for about 100 cars; I am not certain. It has storage capacity, but only about enough to do a day's business to avoid stopping work. It is not what you would call a storage elevator.

Mr. DAY. I only wanted to get at the extent of its storage capacity and its transfer capacity. You think it has a day's capacity independent of transfer—about twenty-five hours margin in the way of storage?

Mr. McCREA. I think that is it. I would be very glad to give you any detail you want.

Mr. DAY. Roughly speaking, what was the cost of that elevator?

Mr. McCREA. Eighty thousand dollars was the cost outside of the tracks.

Mr. DAY. Did that cover the cost of machinery?

Mr. McCREA. It covered the cost of everything. My recollection is that when the contract was made, or the agreement was made to operate, we did not know exactly what the cost was going to be; it was left blank; it was originally estimated at $60,000. Then we made some changes and improvements in it and, as I recollect it, our people figured the cost to be somewhere about $81,000 or $82,000, and we sent that to Mr. Counselman to go over, and he came back and struck out one or two items—something in connection with the water supply which

he said ought not to be charged against it, and a lot of small items, I do not remember what they were—and he reduced it, he claims, to between $78,000 and $79,000. I did not have the time to attend to it and I wrote to him and said we will split this difference and call it $80,000. He agreed to that, and that was the price.

Mr. DAY. Has the Panhandle or the Fort Wayne or the Pennsylvania Company, or any of its auxiliaries or agencies, paid anything to Mr. Counselman on any other account than that of transfer?

Mr. MCCREA. I think I answered you that before.

Mr. DAY. I only intended to cover it; I did not intend to doubt what you said.

Mr. MCCREA. No, sir; we have not.

Mr. DAY. Do either of these companies furnish motive power to these elevators?

Mr. MCCREA. What do you mean by "motive power?"

Mr. DAY. Power to operate it.

Mr. MCCREA. No, sir.

Mr. DAY. I found an elevator or two in Chicago where the railroads do that.

Mr. MCCREA. There is nothing in it except what you see in the contract, and the verbal statement to him if he could show me that other people were getting more than he did that I would pay him that.

Mr. DAY. You know nothing of the system that prevails on the seaboard, or the practice that prevails on the seaboard, respecting elevators or charges for elevators?

Mr. MCCREA. Not as of to-day; I do not.

Mr. DAY. I think I understood you to say that the only advantage which Mr. Counselman enjoys by shipping by your route is what he gets out of this Pennsylvania transfer house?

Mr. MCCREA. Yes, sir.

Mr. DAY. And so far as you have any information, no shipper—no person enjoys any advantage over the public generally in the transportation over your lines of grain or its products?

Mr. MCCREA. No, sir.

Mr. DAY. Or has during the period covered by this inquiry—since January 1?

Mr. MCCREA. No, sir.

Mr. DAY. I mean by that, that neither directly or indirectly has the cost of transportation been lessened below that stated in your published tariffs as filed with the commission?

Mr. MCCREA. Not that I know of; no, sir.

Mr. DAY. The traffic charges on corn billed for export or designated for export during a portion of this period was carried at 5 cents a hundred pounds below that charged for grain which was designated for domestic use at the seaboard?

Mr. MCCREA. It was carried below. I do not know how much.

Mr. DAY. What evidence did you have or did you require that the corn was to be exported which induced you or your companies to carry it below the domestic rate?

Mr. MCCREA. Only the fact—I do not know that I can answer that except in a general way. You are getting down into detail.

Mr. DAY. Of course you do not have anything to do with the actual performance of the work. You have a supervision of the work?

Mr. MCCREA. No, sir; I do not really know much about it except in a general way. I know the way it is done. Corn there comes to us from beyond, or is reported to us for export, and we send it, and our

agents in the East, if it is not exported, they correct the billing back, and if it is, it goes forward.

Mr. DAY. Your understanding is that your agents at the seaboard exercise a surveillance over it in order to ascertain whether it is exported?

Mr. MCCREA. Yes, sir; I so understand that.

Mr. DAY. Mr. Joyce, in making answer for the Pennsylvania Railroad Company, says that these shipments were delivered either to the elevators or to the steamships in so far as they were for export. In the case of grain shipments for export the identity is lost immediately as the grain is placed in the elevators, and necessarily the knowledge of the company's agent also ceases at the time of such delivery to the elevators. I should like to have you state what information came to you that induced you to carry corn identical in grade, say, from Chicago junction points to Philadelphia, New York, or Baltimore, charging one less per hundred pounds because it was said to be for export than you did for the other which was said to be for domestic use. I supposed that you had supervision that would enable you to know what was done that you might have some information on which your subordinates acted in accepting less for one consignment of grain than for the other when it was graded the same and carried in the same train.

Mr. MCCREA. I do not want the answer which I made to your former question to be construed as differing from that of Mr. Joyce. He knows about it much better than I do, but I do not see anything inconsistent in the two answers, because while the identity of a particular carload of grain is certainly lost in the elevator the amount of grain that goes in or out is divided as between domestic and export.

In further answer, I would say that we have no means of checking the destination of the grain beyond the agency of the Union Line, which is the joint bureau between the lines east and west of Pittsburg for transacting that character of business. It is received by their agent in the West and delivered by their agent in the East, and when changes are made they are reported back from the delivering agent to the receiving agent. I think that covers it.

Mr. DAY. Have you any information which leads you to believe that any corporation with which you are connected pays to any other corporation money, or credits it on any account, for the transportation of traffic carried by any other concern—any other company—than the one which actually pays the money or makes the credit?

Mr. MCCREA. I will say no, sir; I have no such information.

Mr. DAY. Have you, during the past eight months or a year, had contractual relations in respect to traffic with the belt lines of Chicago, or any of them?

Mr. MCCREA. No; I think not. I think we have divisions. We have divisions, you know, with those lines; that is, a division of the pro rate, as we have with almost everybody else. Is that what you mean?

Mr. DAY. That partially answers my question.

Mr. MCCREA. Of course, we have that; yes, sir.

Mr. DAY. With all of them?

Mr. MCCREA. I expect we do; I do not really know.

Mr. DAY. Who makes those divisions—who agrees to them?

Mr. MCCREA. They are done by the general freight agent. We have a traffic manager and two general freight agents. That would come within the duties of the general freight agent.

Mr. DAY. Who are they?

Mr. MCCREA. Of the Pan Handle, J. B. Hill.

Mr. DAY. Where is his office?

Mr. MCCREA. At Columbus. With the Fort Wayne, Mr. James P. Orr. He is at Pittsburg. Mr. McCabe is the traffic manager. If you want to know whether, through that medium, we have been manipulating traffic, I will tell you right now that we have not.

Mr. DAY. I think that is all I desire to ask.

Mr. MCCREA. All right, sir. I explained to Commissioner Morrison that about three or four days ago a marshal came with a subpœna for Mr. John Dennison, who is auditor for the Union Line. Mr. Dennison had just gone away for two weeks to visit his two boys, whom he had not seen for a year, who had a ranch out near Medora. He will be back, probably, about the 1st of August or a little afterwards, and will be very glad to come here; or, if you would like, Mr. Hamilton, who could answer the questions as well as Mr. Dennison. I think Mr. Hamilton had charge of making up those reports——

Mr. DAY. You might give the stenographer Mr. Hamilton's name, if you remember it.

Mr. MCCREA. I do not; that is, I do not remember his initials; I think it is Hamilton; it might be Morrison. At all events, Mr. Dennison will be home about the 1st of August.

Mr. DAY. Very well. I think that is all now.

SUN BUILDING,
Washington, D. C., October 29, 1897.

JAMES MCCREA, ESQ.,
Vice-President Pennsylvania Railroad Company, Pittsburg, Pa.

DEAR SIR: Referring to your testimony taken at Washington July 20, 1897, in regard to the traffic turned over to the Pennsylvania lines at Chicago or Chicago junction points by the Baltimore and Ohio Railroad or its receivers or their agents during the period from January 1 to April 15, 1897, I beg to request that you furnish the commission, at the earliest practicable date, the statement promised, showing the total tonnage so turned over to the lines of the Pennsylvania system. You are also requested to furnish the commission with copies of the correspondence, telegraphic or otherwise, that passed between the Pennsylvania Company or any of the officers or agents of the Pennsylvania system and the receivers or agents of the Baltimore and Ohio Railroad relating to such traffic, and the percentages which the Pennsylvania lines were entitled to under the "arbitrators' award" of October 30, 1896.

Yours, truly, W. A. DAY.

PENNSYLVANIA LINES WEST OF PITTSBURG,
Pittsburg, Pa., November 13, 1897.

WILLIAM A. DAY, ESQ.,
Counsel for the Interstate Commerce Commission,
Washington, D. C.

MY DEAR SIR: Absence from the office and the necessity for a very thorough search through our records have prevented a more prompt response to the inquiries contained in your communication of October 29, asking for additional information in connection with my testimony

before the Interstate Commerce Commission on July 20, 1897. I now beg to say:

First. That the total tonnage turned over to the Pennsylvania lines (Pittsburg, Fort Wayne and Chicago Railway) at Chicago and Chicago common points by the Baltimore and Ohio Railroad Company during the period between January 1 and April 15, 1897, was between 1,900 and 2,100 tons. If you want the details of this tonnage, showing dates, car numbers, etc., I shall be glad to furnish them, but it will take some time to obtain the information, as it will have to be worked up from our waybills, etc.

Second. Having reference to your request for copies of the correspondence, telegraphic or otherwise, that passed between the Pennsylvania Company, or any of the officers or agents of the Pennsylvania system, and the receivers or agents of the Baltimore and Ohio Railroad Company relating to such traffic, at the time of my examination before the commission I stated that I did not remember whether the arrangement had been a verbal or written one, but that I thought it was by letter or telegraph. In this I must have been mistaken, as I have been unable to find any correspondence on the subject, and, upon thinking the matter over, it seems to me—although I will not be positive—that it was a verbal arrangement between Receiver Murray and myself. The conversation, as I recollect it, was that Mr. Murray stated that they were considerably "over" in the volume of their Chicago business, and asked, if they turned some of it over to the Pennsylvania lines, whether we would redeliver same to the Baltimore and Ohio Railroad at Pittsburg, to which I replied "certainly," and directed our then freight traffic manager to carry out the arrangement. I presume that Mr. Murray gave similar instruction to his traffic officers, and that the correspondence (copy of which is inclosed herewith) resulted therefrom.

Third. Under the arbitrator's award of October 30, 1896, the Pennsylvania lines were entitled to carry 19.4 per cent of the east-bound live stock and 21.2 per cent of east-bound dead freight from Chicago and Chicago common points.

Very truly, yours,

JAMES MCCREA,
Vice-President.

BALTIMORE AND OHIO RAILROAD,
Baltimore, November 24, 1897.

Mr. JAMES MCCREA,
First Vice-President Pennsylvania Company, Pittsburg, Pa.

DEAR SIR: I return correspondence inclosed with your communication of November 15. I do not now recall any conversation on the subject. I am not, however, at all positive that it did not occur. It is my inference, after reading Mr. Borner's letter of December 11 to Mr. Cole, that the matter was conducted through our respective freight officials.

Yours, very truly,

O. GRAY MURRAY.

Mr. Murray is probably right. My recollection is very vague as to the transaction.

J. MCCREA.

[Telegram.]

PENNSYLVANIA LINES WEST OF PITTSBURG,
Pittsburg, Pa., January 16, 1897.

C. L. COLE, *General Freight Agent Pennsylvania Lines:*

It will be satisfactory to the Pittsburg and Western to take the diverted business to go east via Baltimore and Ohio at Station C. To

insure prompt handling, however, please see that Pittsburg and Western are promptly supplied with proper transfer slips and all information necessary to move the cars from transfer.

T. W. GALLEHER,
General Freight Agent Baltimore and Ohio, Pittsburg, Pa.

[Telegram.]

PENNSYLVANIA LINES WEST OF PITTSBURG,
Pittsburg, Pa., January 16, 1897.

T. W. GALLAHER,
Baltimore and Ohio Railroad, Pittsburg:

Your company proposes to divert to our line at Chicago some business for seaboard cities that is to be redelivered to the Baltimore and Ohio at Pittsburg, through the Pittsburg and Western and junction railroads. I instructed Mr. Borner to say to Mr. Bigelow that we would accept the traffic, provided the Pittsburg and Western will take the cars through the connection in the Manchester yards, and you can readily see that we can not afford to pay switching to the West Penn. Railroad in order to make delivery to the Pittsburg and Western. I understand a few cars were carded from South Chicago last night, and request you will make immediate arrangements with the Pittsburg and Western to accept them at the point we propose.

C. L. COLE.

[Personal.]

PENNSYLVANIA COMPANY,
GENERAL WESTERN FREIGHT AGENT,
Chicago, Ill., January 15, 1897.

Mr. C. L. COLE,
General Freight Agent, Pittsburg, Pa.

DEAR SIR: Regarding diversions from the Baltimore and Ohio, as indicated in letter from General Western Freight Agent A. P. Bigelow, which you saw here yesterday, copy of which we now inclose as per request, we have to advise further that this morning our agent from South Chicago, with the undersigned, met Messrs. Bigelow and Weyman, the latter the local agent of the Baltimore and Ohio, and had somewhat of a definite understanding in regard to the transaction of the business. Two cars of freight were delivered to us at South Chicago last night and will go forward this evening, and in regard to which we will wire you so that you can arrange, as suggested, for prompt movement through Allegheny to the Baltimore and Ohio.

The arrangements are as follows: All fixed expenses which the Baltimore and Ohio are subject to in gathering up this diverted traffic, such as stock-yard trackage, elevator switching charges, etc., are to be prorated on per cents, as indicated in copy of letter inclosed. The fixed charges against us on diverted traffic are: First, switching charge of $2 for delivery via Junction Railroad, transfer between Allegheny and Glenwood; second, the actual cost of transferring grain from Western cars to Baltimore and Ohio cars, which will not exceed $1 per car, and third, the switching service of the Baltimore and Ohio, which has been agreed to by all concerned at $2 per car when freight originates at

South Chicago on the Baltimore and Ohio and $3 per car when such diverted freight originates on the tracks of the Baltimore and Ohio in this city or at the stock yards. The detail is to be carried out between the Baltimore and Ohio local agent and our own at South Chicago. So far as the switching arrangements at Chicago and South Chicago are concerned, it would seem as though we made as favorable an arrangement as possible, as our local agent was of the opinion first that a fair compensation would be about $3 per car on all traffic delivered us, and yet we succeeded in obtaining $2 on a portion of the traffic and $3 on the remainder.

Yours, truly,

WM. BORNER, *G. W. F. A.*

[Personal.]

PENNSYLVANIA COMPANY,
GENERAL WESTERN FREIGHT AGENT,
Chicago, Ill., January 14, 1897.

Mr. WM. BORNER,
G. W. F. A., Pennsylvania Company, Chicago.

DEAR SIR: With further reference to our conversation yesterday concerning diversions from this company to your line, we will begin at once to turn over to your company what freight we can consistently, making deliveries to you at South Chicago. The cars will be accompanied by transfer freight bills, which will give you full shipping instructions, contents of cars, weight, etc. It is to be understood that you will bill this freight to Allegheny and surrender it back to our company at that point. The divisions applicable upon the traffic, according to our figures, will be as follows:

	Miles.
Baltimore, Md.:	
Pennsylvania Company, South Chicago to Allegheny	456
Baltimore and Ohio, Allegheny to Baltimore	333
Total mileage	789
Percentage proportion, Pennsylvania Company	57.8
Percentage proportion, Baltimore and Ohio	42.2
Washington, D. C.:	
Pennsylvania Company, South Chicago to Allegheny	456
Baltimore and Ohio, Allegheny to Washington	307
Total mileage	763
Percentage proportion, Pennsylvania Company	59.8
Percentage proportion, Baltimore and Ohio	40.2
Philadelphia, Pa.:	
Pennsylvania Company, South Chicago to Allegheny	456
Baltimore and Ohio, Allegheny to Philadelphia	429
Total mileage	885
Percentage proportion, Pennsylvania Company	51.5
Percentage proportion, Baltimore and Ohio	48.5

In billing this freight you will deduct the following arbitraries before prorating: On dead freight for Baltimore, Philadelphia, and Washington, 1½ cents per 100 pounds. There is a junction railroad transfer charge between Allegheny and Glenwood of $2 per car. This, however, we will include in our statement to you of the terminals which must be borne by the property at Chicago. The Chicago terminals are of a varied character, which you fully understand, such as switching, trackage, transfer charges, etc. In order to simplify matters, we believe

that these particular charges can be better adjusted in a statement independent of the original billing, and we will periodically, or at the time of the discontinuance of the diversions, render to your company a statement covering the Chicago terminal charges which are to be pro-rated, also the junction railroad transfer charge at Allegheny.

I would further request that in billing the diverted freight from South Chicago you place prominently upon the waybills the term "Diverted freight from the Baltimore and Ohio road." We desire this notation made upon your billing in order that Chairman Tucker will be able to check same and give us due credit for all tonnage.

We trust that you will give all of the diverted freight very prompt movement.

Please acknowledge receipt by bearer, and state if the conditions contained herein meet with your approval.

Yours, truly,

A. P. BIGELOW, *G. W. F. A.*

PENNSYLVANIA COMPANY,
OFFICE OF THE GENERAL FREIGHT AGENT,
Pittsburg, Pa., December 12, 1897.

WILLIAM BORNER,
Chicago, Ill.:

Please say to Mr. Wight that we will take the grain at Chicago he proposes to turn over to us, and will surrender the cars to the Pittsburg and Western Railroad at Allegheny through the track connection in Manchester yard, but we can not undertake to make the delivery at Pine Creek, as the West Pennsylvania Railroad would demand switching charge. I presume the grain is corn, contracted at the old rate, and the switching at Chicago should be made as low as possible if we are expected to absorb it.

C. L. COLE.

PENNSYLVANIA COMPANY,
GENERAL WESTERN FREIGHT AGENT,
Chicago, Ill., December 11, 1896.

Mr. C. L. COLE,
General Freight Agent, Pittsburg, Pa.

DEAR SIR: Manager Freight Traffic Wight and General Western Freight Agent Bigelow, of the Baltimore and Ohio, have just been in this office and interviewed us in regard to their excess tonnage out of Chicago. They desired to know if, in the event that they diverted grain to our line at South Chicago, on account of our shortage, if we would resurrender the traffic to their system, the Pittsburg and Western, at Pittsburg.

The gentlemen named stated that while they did not know whether the courts would permit them to deliver traffic to us, they being in the hands of a receiver, still they would like to know if we would redeliver the property to them at Pittsburg, as indicated, and also to pay a reasonable switching charge for delivering the property to us at South Chicago. If we assent to these conditions they will take the matter in hand to see whether they could get permission to divert grain traffic to us.

Heretofore, as you are aware, traffic has been received by Eastern lines from those in excess by those in deficit with the understanding that it was to be surrendered to the originating line again at the western termini, and it has also been customary to pay a reasonable switching charge at the point where the grain is diverted.

We do not know how genuine this proposition is, but it might be well to test their sincerity and agree to the conditions named for which there has been precedent heretofore.

Kindly advise us by wire early to-morrow morning, as Mr. Wight desires to leave the city some time during the day.

Yours, truly,

WM. BORNER, *G. W. F. A.*

NEW YORK PRODUCE EXCHANGE v. BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

The New York Produce Exchange *v.* The Baltimore and Ohio Railroad Company and others is a proceeding brought by the Produce Exchange of the city of New York for the purpose of abolishing certain differentials of 2 cents per hundred pounds in favor of Philadelphia, and 3 cents per hundred pounds in favor of Baltimore, Norfolk, and Newport News, against New York. The complaint alleges that the various defendants are members of a combination known as the Joint Traffic Association, and that this association, by the combined action of the various defendants, enforces the differentials complained of.

The answers of the various defendants show that all of them except three are members of the Joint Traffic Association. The only testimony introduced upon the trial as to that association consisted of the putting in of the articles of agreement under which the association was formed and the testimony of Mr. George R. Blanchard, who then was and still is its commissioner. A copy of this testimony and of the articles of association is herewith transmitted.

In his testimony Mr. Blanchard refers to certain circulars which were issued by him as commissioner, and a great many of these circulars were furnished the commission as a part of that testimony. Copies of several circulars signed by the commissioner of the association are herewith transmitted as sufficiently showing the nature of all.

From January 1, 1896, to November 4, 1897, less than two years, the board of managers of the Joint Traffic Association promulgated 1,221 circulars or rulings naming rates or containing regulations affecting rates, as appears by issues thereof printed and distributed from time to time. These circulars or rulings are not filed with the commission, but some have been secured by order issued in a pending case, and they are all contained in many unofficial files.

The authority exercised over rates is indicated in the following:

FREIGHT CIRCULAR NO. 222.

[Superseding freight circulars Nos. 32 and 146.]

[Corrected.]

[Board of managers: John Burton, George G. Cochran, John B. Garrett, D. S. Gray, H. J. Hayden, B. A. Hegeman, Milton Knight, Orland Smith, W. P. Walker, jr. H. J. Hayden, chairman.]

JOINT TRAFFIC ASSOCIATION,
143 Liberty street, New York, May 27, 1896.

RATES ON GRAIN EX-LAKE.

The managers recommend the following, effective Monday, June 1, 1896, and to remain in force until further notice:

(1) That the following rates apply at and east of Lake Erie ports on ex-lake wheat, corn, rye, or barley in lots of 8,000 bushels or over, and on ex-lake oats in lots of 10,000 bushels or over, shipped from one of

said ports at one time by one shipper to one consignee and destination, and for one station delivery at such destination:

[In cents per bushel.]

	Wheat.	Corn and rye.	Barley.	Oats.
To New York	5	4½	4½	3½
To Philadelphia	4	3¾	3¾	3
To Baltimore	4	3¾	3¾	3

(2) That the foregoing rates to New York, Philadelphia, and Baltimore also apply at and east of Lake Erie ports on similar quantities of ex-lake grain destined to interior points south of the southern boundary of New York State, shipped from said ports at one time to one consignee and destination.

(3) That on ex-lake grain for Albany rate points the New York at and east of Lake Erie port rates may be applied on quantities of 8,000 bushels or more of wheat, corn, rye, or barley, and 10,000 bushels or more of oats, shipped from one of the said ports at one time, by one shipper, to one consignee and destination, and from one station delivery at such destination.

(4) That the following rates apply at and east of Lake Erie ports on ex-lake grain destined to Philadelphia or Baltimore, or to interior points south of the southern boundary of New York State, based on New York, Philadelphia, or Baltimore rates, when shipped in lots of less than 8,000 bushels of wheat, corn, rye, and barley, or 10,000 bushels of oats:

[In cents per bushel.]

	Wheat.	Corn and rye.	Barley.	Oats.
To New York basing points	6¼	6	5½	4½
To Philadelphia basing points	5½	5	5	4
To Baltimore basing points	5¼	5	5	4

(5) That the rates at and east of Lake Erie ports to Camden, N. J., on ex-lake grain be: on wheat, corn, rye, and barley, one-half cent per bushel, and oats, one-quarter cent per bushel above the foregoing rates for similar quantities destined to Philadelphia.

(6) That the rates at and east of Buffalo and Erie on ex-lake flaxseed, in carloads, cars to be lined at the expense of shippers or owners, be on the basis of 1 cent per bushel above the at and east of Buffalo and Erie rates on wheat in carloads in similar quantities, carriers to assume no liability for leakage.

(7) That the rates on ex-lake grain from Buffalo to Boston, for export, be the same as the rates hereby established from Buffalo to New York.

(8) That on through lake and rail grain from western lake ports destined to New York, Philadelphia, or Baltimore, through rates may be quoted from such western ports, provided they are not less than the sum of the current lake rates plus the rates established from time to time at and east of Lake Erie ports.

(9) That these rates apply only to ex-lake grain, and the traffic shall be subject to the examination of the chief inspector, who shall report any cases in which it is claimed, or in which he finds, that the rates are improperly used.

G. R. BLANCHARD,
Commissioner.

FREIGHT CIRCULAR NO. 274.

[Abrogating freight circulars Nos. 87, 102, and 130.]

[Board of managers: John Burton, Geo. G. Cochran, John B. Garrett, D. S. Gray, H. J. Hayden, B. A. Hegeman, Milton Knight, Orland Smith, W. P. Walker, jr. H. J. Hayden, chairman.]

JOINT TRAFFIC ASSOCIATION,
143 Liberty Street, New York, June 24, 1896.

RATES ON NEW STEEL AND IRON RAILS.

The managers have approved the joint recommendations of representatives of the Central Freight and Trunk Line Association companies, made at Pittsburg May 7, 1896, touching the transportation of new rails, to the following effect, viz:

(1) That a special committee be appointed, to consist of one representative of each of the railroads leading from Chicago, Lorain, Bessemer, Johnstown, and eastern Pennsylvania and Maryland districts, as follows:

Districts.	Companies.
Chicago	Baltimore and Ohio. Grand Trunk system. Cleveland, Cincinnati, Chicago and St. Louis. Erie. Lake Shore and Michigan Southern. Michigan Central. New York, Chicago and St. Louis. Pittsburg, Cincinnati, Chicago and St. Louis. Pittsburg, Fort Wayne and Chicago. Wabash.
Lorain	New York, Chicago and St. Louis. Cleveland, Lorain and Wheeling.
Bessemer	Pennsylvania. Lake Shore and Michigan Southern. Erie.
Johnstown	Baltimore and Ohio. Pittsburg and Lake Erie. Pennsylvania.
Eastern Pennsylvania and Maryland	Baltimore and Ohio. Central of New Jersey. Delaware, Lackawanna and Western. Philadelphia and Reading. Lehigh Valley. Pennsylvania. Baltimore and Ohio. Delaware and Hudson.

(2) That all questions of rates on new steel and iron rails from said districts be referred directly to said committee, but the rates proposed by that committee upon Joint Traffic Association traffic are to be subject to the approval of the managers.

(3) That the rates on new rails from Scranton, Pa., Danville, Pa., Bethlehem, Pa., Chester, Pa., Steelton, Pa., and Sparrows Point, Md., to western points in effect January 1, 1896 (and duly filed with this association), namely $3.60 per ton of 2,240 pounds from the said points to Chicago, and on that basis from those points to other western points, be authorized.

(4) That the rates agreed upon between the Johnstown, Bessemer, and Lorain committees, substantially on the same basis as those from the eastern points named above, be also authorized.

The rates from Bessemer and Lorain are those agreed upon at a joint meeting of those committees June 4 and 5, 1895, and are as shown in its proceedings.

(5) That the rates from Johnstown to points west of Pittsburg be 10 per cent above the west-bound rates from Bessemer, with a maximum of 30 cents and a minimum of 15 cents per ton of 2,240 pounds above the rates from Bessemer; but that no rate from Johnstown to any point west of Pittsburg be lower than $1 per ton of 2,240 pounds.

(6) The rates from Pittsburg, Cochran, and Munhall will be the same as from Bessemer in both directions.

(7) That effective on legal notice, east-bound rates on new rails from Chicago be authorized as follows:

[Per ton of 2,240 pounds.]

To Albany, N. Y., and points taking same rates	$4.00
To New York, N. Y., and points taking same rates	4.00
To Philadelphia, Pa., and points taking same rates	3.60
To Baltimore, Md., and points taking same rates	3.40
To Boston, Mass., and points taking same rates	4.70

G. R. BLANCHARD, *Commissioner.*

FREIGHT CIRCULAR No. 593.

[Board of managers: John Burton, Geo. G. Cochran, John B. Garrett, D. S. Gray, H. J. Hayden, B. A. Hegeman, Milton Knight, Geo. Olds, Orland Smith, W. P. Walker, jr. H. J. Hayden, chairman.]

JOINT TRAFFIC ASSOCIATION,
143 Liberty street, New York, January 15, 1897.

RATES ON EXPORT CORN.

The managers recommend that, effective January 20, 1897, and continuing until modified or withdrawn by their action, rates on export corn only, in car loads, minimum weight as per official classification, be made on the basis of 15 cents per 100 pounds, Chicago to New York, with usual differences to other seaboard cities.

G. R. BLANCHARD, *Commissioner.*

The rules of the traffic association were suspended, and competition in certain territory was permitted by the following freight circular, No. 46, issued March 11, 1896:

"The managers have adopted the following:

"*Resolved*, That the rules of the Joint Traffic Association be, and are hereby, suspended until otherwise ordered on all freight traffic to and from all points in the State of Virginia on and south of a direct line drawn from Clifton Forge, Va., northeastwardly to Orange, Va., and thence southeastwardly along the line of the Chesapeake and Ohio to and including Norfolk and Portsmouth, Va., so that lines in the Joint Traffic Association may, if necessary, meet the competition of outside carriers, with the distinct understanding, however, that this suspension of rules shall not in any way detrimentally affect traffic to and from other territory subject to the joint traffic agreement, and that export or import business coming within the jurisdiction of the Joint Traffic Association shall continue to be handled under its rules; and provided further, that the option herein granted shall only be exercised by mutual understanding or agreement between the representatives of the freight departments of the Chesapeake and Ohio, Pennsylvania, and the Baltimore and Ohio railroads, and that all tariffs issued under this grant in competition with lines outside of this association shall be filed with the managers for their information.

"G. R. BLANCHARD, *Commissioner.*"

On October 30, 1897, by freight circular No. 1218, the managers promulgated the rules to govern the computation of west-bound commodity rates authorized on and after November 8, 1897. These rules read as follows:

"(1) When a rate per ton is authorized on any commodity from New York to Chicago, either locally or as a basis for other Western points, and it is provided that corresponding rates shall apply from other Eastern cities, the rate per ton shall in all cases be used as the basis for computing the rates upon such commodity, and not the equivalent rate per 100 pounds.

"(2) When a rate per 100 pounds or per ton is authorized upon any commodity from an interior trunk-line point (other than points taking Philadelphia or Baltimore rates) to Chicago, and it is provided that corresponding rates shall apply to other Western points, such rate shall be arrived at by scaling the rate per 100 pounds or per ton on the established percentages of the rate from such interior point to Chicago applicable to such Western points.

"ILLUSTRATIONS.

"(*a*) Assuming a commodity rate has been authorized from Albany, N. Y., to Western points on basis of 16 cents per 100 pounds—Albany to Chicago—the rate to East St. Louis would be computed on the basis of 116 per cent of 16 cents, which would make the rate to East St. Louis 19 cents per 100 pounds.

"(*b*) Assuming a commodity rate has been authorized from Albany, N. Y., to Western points on basis of $3.20 per ton—Albany to Chicago—the rate to East St. Louis would be computed on the basis of 116 per cent of $3.20, which would make the rate to East St. Louis $3.71 per ton.

"(3) When a rate per 100 pounds or per ton is authorized upon any commodity from New York to Chicago as a basing rate, and it is provided that corresponding rates shall apply from interior points, the rate from Albany, N. Y., to Chicago and other points, taking 100 per cent of New York-Chicago rates, shall be 80 per cent of the New York-Chicago rate, and the rate from Syracuse or Rochester, N. Y., to Chicago and other points, taking 100 per cent of New York-Chicago rates, shall be 70 per cent of the New York-Chicago rate. Rates to points taking other than 100 per cent of New York-Chicago rates shall be scaled on the established percentage basis of the rate from Albany to Chicago, or Syracuse-Rochester to Chicago, as the case may be.

"(4) When a rate per 100 pounds or per ton is authorized on any commodity from an interior trunk-line point, taking Philadelphia or Baltimore rates to Chicago, and it is provided that corresponding rates shall apply to other Western points, such rates shall be computed on the basis of the equivalent New York rates per 100 pounds or per ton.

"ILLUSTRATIONS.

"(*a*) Assuming a commodity rate has been authorized from Lancaster, Pa., to western points on basis of 22 cents per 100 pounds, Lancaster to Chicago. To obtain the East St. Louis rate, add 2 cents to the 22 cents (Lancaster being a Philadelphia-rate point), thus making an equivalent rate New York to Chicago of 24 cents. The East St. Louis rate should then be made 116 per cent of 24 cents, or 28 cents, from which deduct the Philadelphia differential of 2 cents, making the rate Lancaster to East St. Louis 26 cents per 100 pounds.

"(*b*) Assuming a commodity rate has been authorized from Lancaster, Pa., to western points on basis of $4.40 per ton, Lancaster to Chicago. To obtain the East St. Louis rate, add 40 cents to the $4.40 rates (Lancaster being a Philadelphia-rate point), thus making an equivalent rate New York to Chicago of $4.80. The East St. Louis rate should then be made 116 per cent of $4.80, or $5.57, from which deduct the Philadelphia differential of 40 cents, making the rate Lancaster to East St. Louis $5.17 per ton.

"G. R. BLANCHARD, *Commissioner.*"

Another circular dated February 4, 1898, permits carriers in the association to meet a competitive rate over routes through Canada. The circular reads as follows:

FREIGHT CIRCULAR No. 1369.

[Board of managers: John Burton, Geo. G. Cochran, D. S. Gray, H. J. Hayden, B. A. Hegeman, Milton Knight, Geo. Olds, Geo. F. Randolph, Orland Smith, W. P. Walker, jr. H. J. Hayden, chairman.]

JOINT TRAFFIC ASSOCIATION,
143 Liberty Street, New York, February 4, 1898.

RATE ON LEATHER FROM WISCONSIN POINTS TO BOSTON, MASS., ETC.

The managers have dopted the following:

"Whereas the Soo Line issued a tariff, effective June 8, 1896, publishing rate of 50 cents per 100 pounds on leather in carloads, from Prentice, Wis., to Boston, Mass., and such rate was subsequently made effective on the same article by the Chicago, Milwaukee and St. Paul Railway from Wausau and Merrill, Wis., via Soo Line and its eastern connections; and

"Whereas, pursuant to action of the directors of the Grand Trunk Railway Company of Canada, the same rate has been made effective on like traffic from Wausau, Merrill, Phillips, Chelsea, and Medford, Wis., to Boston and Boston-rate points via Chicago and the Grand Trunk Railway system (main line), as well as via across Lake Michigan routes connecting with the Grand Trunk Railway system (main line); and

"Whereas the same rate has been made effective on like traffic from Wausau and Merrill, Wis., to Boston via car-ferry route across Lake Michigan, in connection with the Canadian Pacific Railway via Detroit; and

"Whereas lines leading from Milwaukee and Chicago, competitive with the Grand Trunk Railway system, have requested authority to participate in like through rate on leather, in carloads, from such Wisconsin points to same eastern points,

"*Resolved*, That, effective February 10, 1898, it shall be permissible for the railway companies parties to the Joint Traffic Association to participate, via all routes via Chicago and Chicago junctions, also via west bank Lake Michigan points and via Mackinaw, in a through rate of 50 cents per 100 pounds on leather, in car loads, minimum weight 20,000 pounds, from Wausau, Merrill, Phillips, Chelsea, and Medford, Wis., to Boston and other Boston-rate points to which the same rate is in effect via the Grand Trunk Railway system (main line) and its eastern connections."

G. R. BLANCHARD, *Commissioner.*

GEORGE R. BLANCHARD, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Mr. KERNAN. Where do you reside?

Mr. BLANCHARD. In New York.

Mr. KERNAN. You are connected with the Joint Traffic Association?

Mr. BLANCHARD. I am, as its commissioner.

Mr. KERNAN. And you have occupied that position for how long?

Mr. BLANCHARD. Since the association was first organized, a year ago the 1st of last January.

Mr. KERNAN. And prior to that time what experience generally had you had in railroad matters, and especially with reference to rate matters?

Mr. BLANCHARD. I had for eight years been the commissioner of the Central Traffic Association at Chicago. Prior to that time I had occupied positions with the Erie Company as general freight agent and vice-president, and formerly as general freight agent of the Baltimore and Ohio, and prior to that time with the Central Ohio and Ohio and Mississippi Railway companies.

Mr. KERNAN. And this service that you have mentioned covered about how many years in the aggregate?

Mr. BLANCHARD. It covers about thirty years.

Mr. KERNAN. Now, when the Joint Traffic Association first began business—went into operation—it found in existence in the rate sheets these differentials which we have talked about.

Mr. BLANCHARD. Yes, sir.

Mr. KERNAN. And it did nothing at that time except to accept the rate sheets as they were with these differentials in them?

Mr. BLANCHARD. That is all.

Mr. KERNAN. And it has not since that time sought in any way to change the differentials, but simply to enforce them as it found them?

Mr. BLANCHARD. They have not sought to change them. They have had them under advisement and for consideration, but have never made any changes or done anything positive about it.

Mr. KERNAN. Now, you may just briefly give us an idea of how the Joint Traffic Association carries on its operation under the agreement which is on file with the commission; what its agencies are for carrying out what that agreement provides shall be done under the agreement.

Mr. BLANCHARD. The organization of the Joint Traffic Association, as the contract shows, required that the railway companies which had in effect tariffs under date of the 1st of January or prior thereto should, in accordance with the resolutions of the board of directors of the various companies comprising the association, file the existing class rates and commodity rates, in both directions, with the associations, to establish a starting point for the maintenance of rates. Those rates were filed from time to time. Those are the rates that, from time to time, were considered as to whether any changes were to be made in them or the rules applicable to them. Briefly, that is the procedure.

Mr. KERNAN. The object of the association, mainly, is to enforce the rates they have in operation; and, as modified from time to time, in so far as they may do so, lawfully?

Mr. BLANCHARD. The powers of the managers, as stated by the contract, are recommendatory to the various companies. The boards of directors reserve all their rights and powers. A circular recommending certain action is issued by me, as provided in the contract. When there is any occasion to make changes in the rates, they are sent out in the

form of a circular, which I am authorized to send to the various companies.

Mr. KERNAN. And the object is to procure the maintenance of the rates?

Mr. BLANCHARD. The purposes of the association were to maintain the rates that have been filed; to make common rules; to secure uniformity in the methods of conducting the business; and, as the contract recites, not idly but sincerely, to cooperate with the terms of the interstate-commerce act and those who administer it.

Mr. KERNAN. To do what they could, within the law, to maintain rates?

Mr. BLANCHARD. Yes, sir.

Mr. KERNAN. And from time to time to meet the changed conditions, by recommending such changes as they might think fit?

Mr. BLANCHARD. Quite so; under the same rule of uniformity.

Mr. KERNAN. Now, with reference to the differentials; you say the have taken no action as to changing the differentials?

Mr. BLANCHARD. None at all.

Mr. KERNAN. Now, prior to January 1, 1896, is it true that the full extent and observance of the differentials, as a rule, had been that they were printed in the rates scheduled, and in a desultory way sometimes observed and sometimes not?

Mr. BLANCHARD. It was my belief, judged from my experience, that the schedules published were not maintained in all instances; I would like to add in all instances.

Mr. KERNAN. So that, as a general proposition, it may be stated, may it not, that prior to January 1, 1896, the differentials had not been sufficiently enforced for long enough periods to enable us to test their effect upon the movement of traffic from interior points to the different Atlantic ports?

Mr. BLANCHARD. I should say that that was a correct inference from the situation. I believe the irregularities in the rates largely destroyed the value of the actual comparison of the 3 and 2 cents below New York.

Mr. KERNAN. And that arose from the irregularities which, in one way or another, permitted the differentials to be violated?

Mr. BLANCHARD. It arose from so many causes that it would be difficult to generalize.

Mr. KERNAN. Well, irregularities in one way—I will not say irregularities, but from the fact that in one way or another, either through remission of elevator charges or through some means, the differentials have not been maintained.

Mr. BLANCHARD. I think that is a correct statement. The differentials were not maintained, and the irregularities were the products of concessions in the export conditions—elevator charges, lighterage, manipulation of the proportions of the roads west of those composing the Central Traffic Association. For example, if the Burlington road saw fit to carry through St. Louis instead of Chicago, they might make some concessions. I do not mean those irregularities were always, or even in a majority of instances, attributable to our own lines.

Mr. KERNAN. Now, after the 1st of January, 1896, the association, in such ways as it deemed it might lawfully do, did undertake to eliminate these irregularities and bring about a maintenance of the rates?

Mr. BLANCHARD. In the very exhaustive comparison, made in my office, of some 86,000 tariffs filed under the resolutions of the boards of directors that I have just referred to, various rules and conditions in

the different tariffs were sought to be reconciled; not only the rates themselves, but the differences by the different routes, were sought to be unified; but the rules, regulations, and conditions, the classifications, the car loads, the quantities, constituting the minimum car loads, and a great many things of that kind which had been irregular in the different associations—different in Canada from what they were in the United States, in some instances—all were sought through this association to be made uniform. At the same time we took up every question which constituted an element of uniform charge—the mileage on private cars, out of which it was possible that the owner of those cars might receive certain allowances from the railroads; elevator charges, lighterage charges, delivery charges at Chicago, switching charges, and a multiplicity of those things engaged the attention of the board, with a view to taking all those elements which enter into the making of a rate and which made the rate alike by all routes.

In connection with the elevator charges, for example, at the seaboard where the charges were 2½ cents for 100 pounds, the maintenance of the 2½ cents, which was more than the differential of Philadelphia, was just as important as the differential itself and half a cent more so. The board took into consideration all those things, and entered into correspondence with all the roads from Montreal to Norfolk with a view to enforcing uniformity of terminal charges in accordance with the resolutions of the various boards authorized, and in some instances by the exchanges, and in other instances by private corporations, and in other cases elevators built by the railroads and leased to other persons; and that multiplicity of conditions, complicated by steamship contracts, certain privileges granted by one elevator different from those of another—all those conditions the board has sought strenuously and carefully to equalize before they could determine the actual effect of these various differentials upon the sum total of the various charges at each port and the effect upon the export traffic.

Mr. KERNAN. And the object of this action on the part of the board was the maintenance of the schedule rates as they were filed with you by the different roads, including these differentials, and in order finally to reach a position where a fair test could be made under fair conditions, at all points of origin and at the ports, of the effect of the differentials?

Mr. BLANCHARD. I can repeat that statement as my own; that is substantially the purpose of the association.

Mr. KERNAN. Now, during 1896, is it true that, as the result of the recommendations of the board in the directions that you have suggested, there came about a more uniform enforcement or maintenance of the rates, as per schedules that had existed prior to that time?

Mr. BLANCHARD. It is my belief that the Joint Traffic Association has, by its machinery and the good faith of the officers constituting the roads which compose it, more nearly secured the maintenance of uniform rates than has been secured by any other means at any time, unless it may be the first eight to fifteen months after the passage of the interstate-commerce law.

Mr. KERNAN. And may we not assume, therefore, as the result of that, that the year 1896 is on the whole the fairest test of the differentials that we have since 1882—so far, I mean, as their maintenance through the action you have suggested is concerned?

Mr. BLANCHARD. I think the average maintenance of the rates on the traffic, which I understand to be the subject of your inquiries, has been more nearly accomplished during 1896 than in any other year since—I would not say since 1882—but after the first year following the passage of the interstate commerce act.

Mr. KERNAN. So that, with the exception of the year you have mentioned, we may fairly look at the statistical returns of the movement of traffic in 1896 for the purpose of determining the effect of the differentials better than to any year prior to 1896 that you can mention?

Mr. BLANCHARD. So far as the railroads constituting our association are concerned, yes, sir. It will be understood that the Norfolk and Western and other lines south of us are not members of our association, and I did not intend to say that they averaged better in 1896 than in other years.

Mr. KERNAN. The papers yesterday stated that the Norfolk and Western has come down now.

Mr. BLANCHARD. The Norfolk and Western has agreed to cooperate in certain west-bound traffic. The matter you have in hand has not been touched.

Mr. KERNAN. Now, has the action of the association in its recommendatory capacity, as you have suggested, tended in any degree to equalize the elevator charges at New York, as made by the railroad elevators, the floating elevators, and the Brooklyn Warehouse Company?

Mr. BLANCHARD. As to the Brooklyn Warehouse Company I have no knowledge.

Mr. KERNAN. As to the floating elevators?

Mr. BLANCHARD. As to the floating elevators and stationary elevators at the seaboard termini of all the lines members of our association, the uniform rate was made and a uniform schedule agreed to be adopted.

Mr. KERNAN. That was a new condition, substantially, in 1896, to wit, that the railroad elevators—that is, the floating elevator combination in the harbor here—were induced to unite with your efforts in maintaining a uniform cent and a quarter charge for elevation?

Mr. BLANCHARD. I so understood.

Mr. KERNAN. And that, of course, has resulted in eliminating such diminution of charge as prior to that time the floating elevator combination might have been in the habit of making?

Mr. BLANCHARD. I do not know anything about the concessions prior to that, but after that time they agreed.

Mr. KERNAN. But if prior to that time they had been in the habit of charging less in whole or in specific instances, that was eliminated by this action you mention?

Mr. BLANCHARD. So I understand.

Mr. KERNAN. And the object of that was so that there should be maintained at each port for the elevation of grain, whether through railroad elevators or through floating elevators, a uniform charge of 1¼ cents a bushel?

Mr. BLANCHARD. I think it was a uniform charge of 1¼ cents on grains. It was different on oats.

Mr. KERNAN. And that would also tend, as far as it was accomplished, to maintain these differentials in their integrity?

Mr. BLANCHARD. When I refer to better maintenance of rates in themselves, I refer to all the elements that enter into and compose it.

Mr. KERNAN. How long have you been familiar with the differentials at Buffalo and Erie and Fairport on grain to New York, Philadelphia, and Baltimore?

Mr. BLANCHARD. Well, during late—eight years I was away. I had no familiarity with them. That traffic did not come under my supervision at all. Since the organization of the Joint Traffic Association it only passes under a general review. All that matter continues under

the organization which we call the Trunk Line Association. They make the recommendation to our association and our association acts upon it.

Mr. KERNAN. Then those lake differentials have been the subject of agreement between the trunk lines interested at the ports of Erie and Fairport and Buffalo?

Mr. BLANCHARD. By the lake differentials I understand you to mean the differentials east of Buffalo.

Mr. KERNAN. To the three ports.

Mr. BLANCHARD. Those have been the subject of agreement between the interested lines.

Mr. KERNAN. We find those differentials, Mr. Blanchard, to be a cent and a half a hundred on grain in favor of Philadelphia as against New York, and a cent and a half on grain in favor of Baltimore?

Mr. BLANCHARD. Yes, sir.

Mr. KERNAN. We find that as between Philadelphia and Baltimore, that instead of maintaining the Chicago differentials, giving Baltimore a cent the advantage of Philadelphia, that the ex-lake rate seems to be based upon the idea that there should be no difference between Philadelphia and Baltimore. Can you tell me why that is?

Mr. BLANCHARD. I can not state all the reasons which actuated the Trunk Line Association in those recommendations. The general principle of those recommendations is that, taking this place, Erie, as a sample, with all the lines by rail that come into it, that when the traffic comes to Philadelphia by the way of Erie there should be a differential to Philadelphia and Baltimore by the rail lines, so that the same grain originating at the same points of origin would have the same rates as if the property came to them direct. That was the basis upon which they were generally made. When the Baltimore and Ohio Company meets these lines in conference they have assented not to maintain the full force of that. They have yielded to us to the extent that the rate might be put up to Baltimore to make it the same as Philadelphia.

Mr. KERNAN. Is it not true that that differential can not be based upon distance, inasmuch as there is no difference in distance practically?

Mr. BLANCHARD. I do not understand.

Mr. KERNAN. Is it not true that the differential is not based on distance? Is there any authority on the distance principle for the basing of the differentials?

Mr. BLANCHARD. No; the distance principle is but one of the numerous factors in this whole question of differentials. It is not based upon distance.

Mr. KERNAN. Can it be based upon difference in cost?

Mr. BLANCHARD. In my judgment, no. I do not think the expert lives who can tell the cost of transportation of any particular traffic like this. I think I would like to explain that briefly.

The Pennsylvania Railroad, for illustration, has 80 per cent or more of all its traffic in mineral, stone, lumber, and very heavy articles, which are loaded by the forwarder and unloaded by the consignee. Now, in making the average of the cost on the Pennsylvania, that enormous traffic is put in to reduce the general average, and therefore when you take the general average and apply that to west-bound dry goods or east-bound grain, I do not think anybody can tell you that it is a fair average applicable to that particular business. On the New York Central that is reversed. Only 15 per cent of their traffic is in minerals, and their cost is increased. So it is practically impossible to tell by the average of any railroad or by the average of them all what the cost of the transportation of any particular department of their service is.

Mr. KERNAN. Can you tell me any fairer way to test these differentials as to cost than to take the average cost per ton per mile of the Pennsylvania, say of 4 mills per ton per mile in 1896, inasmuch as it has lines to the three ports of Baltimore, Philadelphia, and New York? That may not be a correct way; but can you tell me any better way by which we can test the differentials by the cost question that is obtainable?

Mr. BLANCHARD. If the cost is to be the basis of fixing these rates, I should say, in view of the attempt to make the differentials bear reasonable and due relation to each other to all those cities, that instead of taking Pennsylvania alone all the lines leading to the seaboard should be taken.

Mr. KERNAN. And that cost averaged?

Mr. BLANCHARD. And that cost averaged. Even then the conditions I have stated would make the average misleading.

Mr. KERNAN. Have you attempted in the Traffic Association to do that?

Mr. BLANCHARD. We have never attempted to do that; we have kept no statistics of that kind.

Mr. KERNAN. You repudiate both the distance and cost question as being practical ones to test this question?

Mr. BLANCHARD. I think they are only approximations.

Mr. KERNAN. Is it not true that the object of the differentials is to obtain an equitable distribution of the traffic to the six Atlantic ports, so as to give to each port that traffic which under normal conditions it would obtain? So as to, in other words, recognize the advantages at each port and to allow each port to get the share which its natural advantages entitle it to?

Mr. BLANCHARD. If I may be permitted another little lecture. The fact about this matter is this: When I was general freight agent of the Baltimore and Ohio Railroad the differentials were never distinctly agreed to, but on a line extending from Baltimore to Indianapolis, or Peoria and Burlington, on the Mississippi River, the rate was 10 cents a hundred less to Baltimore than to New York. Below that line it was 5 cents. Mr. Vanderbilt, with the New York Central lines, took this question up with a view to equalizing that. The petitions to-day are substantially duplicates of those made in 1881 or 1879. The matter was taken up and the differentials were reduced voluntarily by the Baltimore and Ohio lines. I assisted in that, and reduced the 10 cent differential to 5.

Mr. KERNAN. That is what they ought to do now.

Mr. BLANCHARD. Their people are here now, and if you can persuade them to do that the Joint Traffic Association will be relieved of a good deal of trouble. The thought I have about this matter is this: That the differentials ought to take into consideration the larger expenses in New York in every department of its service. But when it comes to the question which is the burning one now, becoming more important every day, the question of the opening of other ports, in the fifteen years, which is a long commercial life or for great questions, since Cooley, Thurman, and Washburn made their award, the conditions ought to be taken up on the grounds they were then. Taking Chicago on the west and Liverpool on the east, it is the desire of the traffic managers of the lines and that of the managers of the Joint Traffic Association to establish such conditions that the rates from these various points to the port of export plus the charges attaching to that traffic at the port of export and plus the ship's rate shall constitute the

common delivery substantially from Chicago to Liverpool. That ought to be the purpose of us all, and I believe it is. In that view of the case I have had no reason to doubt that inasmuch as these changes have been brought about without legislative assistance, with the advice and counsel of the various boards of trade and through conferences and concessions and agreements among the railroads, that when our association had data enough to prove that the various rates were maintained, that then it should be taken up in the same spirit. For my own part, as a commissioner, I welcome this discussion. I think it wise that all parties should hear what has taken place here and that it would be wise to meet in conference and adjust the matter in the same way as before.

Mr. KERNAN. I would like, right in line with that idea, to ask you whether, first, have you looked through the statement and tables and one thing and another which we have prepared?

Mr. BLANCHARD. I have not had time since you sent me a copy.

Mr. KERNAN. Could you suggest any line of investigation or of statistics, in addition to those we have prepared, which would throw light upon the question and enable us to reach a fair determination?

Mr. BLANCHARD. I would like to answer a little at length on that subject, if you please, Mr. Kernan. I was one of the original members of the executive committee of the Trunk Line Association, and at that time the statistics kept by Mr. Fink were very elaborate. It has been commented on here that the rate to Boston for the longer distance is made the same as to New York. Now, to be accurate, and for that criticism to have weight, the sources of that traffic ought to be known. For example, wheat which may be grown in Michigan may go to Boston upon a much less distance than to Baltimore, and unless you know the sources of the business and know its destination and then ultimately reduce it to the ton-miles traveled over each railroad everything is conjecture. Since the Joint Traffic Association was organized we have dropped a great many of those statistics—in part they had been dropped before, and we have never renewed them. Some of the lines in the West voluntarily have kept statistics on that subject. For instance, new lines and elements have come in at St. Louis since the time of Mr. Fink's statement, to which you attach so much importance. There are three lines open to the lake that were not then in the association. They do not report their traffic. We have no means of knowing the extent of their tonnage, where their property originates, etc. We have no means of taking into account all the traffic that originates at Illinois points, for the reason that a large quantity of grain from Kansas and Nebraska, with the charges prepaid to the Mississippi, appears as Illinois traffic while it is not Illinois traffic.

Without going into the refinements of all these questions, these are the difficulties in giving to you the average length of haul, sources of business, and ultimate destination. Another difficulty that appears in the statements of the statistician of the United States at Washington, on asking him if he could tell how much grain came to New York by canal for consumption here, he stated he could not give it. We can not, in all cases, segregate our business so as to tell its points of origin and destination. We have got to generalize in the manner I have spoken of by taking Buffalo as a starting point and making the rates on something as a unit, such as I have just stated. It will afford me great pleasure to go through your tables, and it will be sincere desire of our board and myself to assist this investigation and to make suggestions.

Mr. KERNAN. That is what I wanted to ask you to do. Mr. Fink made a report on this adjustment of transportation to the seaboard in 1882. There are certain tables in that report based upon the traffic of 1880, and especially, at the close of the report, he gives us a table showing the origin of the traffic in the West just as you suggested; in other words, he says, just as you do, in order to determine the question with justice to all, one of the elements to be known is the origin of the Western traffic.

Mr. BLANCHARD. Yes, sir.

Mr. KERNAN. If we wanted to find out whether Duluth traffic—wanted to find out the tonnage of the Duluth traffic—and then want to find whether New York is getting that traffic or whether it is being diverted, for instance, to a point like Baltimore, we might find out in that way fairly whether Baltimore has invaded our parish and taken from us traffic which we ought to have. Now, would it be possible to substitute for the table of that nature, which you have there, one showing the conditions in 1896 in the same way?

Mr. BLANCHARD. There are a great many conditions different from those that prevailed then, as, for example, the traffic that comes to Buffalo now is largely bought in Buffalo—changes hands there. Originally it came through. I do not know that we have any means, with the very large business that arrives at Buffalo by lake, of telling just where it originates, because we do not control that business. Those boats are not in our organization, so it would be more difficult than it was at that time, when so large a part of the business was through business. I have already anticipated this statement by referring to the conditions at Peoria. At St. Louis the lines to the South would divert the business south of the Ohio River. I would be very glad to take this statement and examine it.

Mr. KERNAN. The extent, it seems to me, to which it would need to go would be to take the traffic delivered at the six Atlantic ports and then ascertain the origin of that traffic—the real origin.

Mr. BLANCHARD. Has the produce exchange the sources of the traffic coming from Buffalo by lake, where the charges are paid up to Buffalo, and where we treat it as though it grew in the streets of Buffalo? We do not know where it came from.

Mr. KERNAN. I was speaking of the differentials from Chicago. If we could get the origin of that traffic, that is what we want. The ex-lake traffic is not material. The origin of the ex-lake traffic is Buffalo, Erie, and Fairport. The question we want to get at is whether or not under the operation of the differentials that traffic to which we are entitled under normal conditions—that is, a certain share—is not being diverted by the differentials to the Southern ports. Can you give the amount of all that traffic—of the percentage going to each of the ports?

Mr. BLANCHARD. From each general source of origin?

Mr. KERNAN. From Buffalo, Erie, and Fairport as points of origin.

Mr. BLANCHARD. I think that is all stated.

Mr. BLACKMAR. I think Buffalo, Erie, and Fairport can be treated as one point of origin.

Mr. BLANCHARD. Yes, sir. The same reason holds good when grain comes into Chicago. We do not know whether it came from Winnipeg or San Antonio.

Mr. KERNAN. Will your statistics show the distribution of the traffic?

Mr. BLANCHARD. At Chicago, but not the sources of origin.

Mr. KERNAN. Will the statistics show it at Buffalo?

Mr. BLANCHARD. At Buffalo they do.

Mr. KERNAN. Can you show the distribution of the traffic at Chicago and Buffalo, Erie and Fairport? Can you give us that?

Mr. BLANCHARD. I can supply that.

Mr. KERNAN. Now, taking flour at Minneapolis, the distribution of that could be given, could it not?

Mr. BLANCHARD. That would have to be supplied, I think, by the road west of Chicago, for the reason that some of the traffic passes both over the Canadian Pacific and the "Sioux" roads, and does not come to us at all. It would go by the Grand Trunk and the Canadian Pacific. You can readily obtain that there.

Mr. KERNAN. Is not the same thing true regarding Chicago as a point of origin? Would it not be practicable to show the distribution of traffic as to Chicago, as to the points of origin to those six ports?

Mr. BLANCHARD. Yes, sir. That would be very difficult.

Mr. KERNAN. If you would give us that we would be very glad to have it. How would it be as to Duluth as the point of origin?

Mr. BLANCHARD. Duluth would have nothing to do with it except as it may be shown in the Buffalo, Erie and Fairport statement. That all comes in bulk and would not show Duluth separately.

Mr. KERNAN. We have taken the position on this statement that the canal as an element to be considered on this question has been very much eliminated since 1882. That is due to the fact that the percentage it carries has become so small that these differential rates or railroad rates must be considered now substantially with reference to railroad conditions, and are not to any great extent influenced by the canal conditions. Now, what do you say as to that?

Mr. BLANCHARD. Well, I should dissent from that view. The business of the canal last year, as I recollect it, was approximately, in grain and flour, 17 per cent of the total receipts of New York.

Mr. KERNAN. Six per cent of the total of all these ports?

Mr. BLANCHARD. Six per cent of the total of all these ports, but 17 per cent of the arrivals at New York. A less proportion than that would determine the rail rates.

Q. Now, when you assume that the canal is a competitor, not only of grain and corn, and to a limited extent of such gross articles as lumber, and to some extent coal, does it not follow that, at least as to all rates except those as to flour and grain, the canal has ceased to be a factor to be considered in determining this differential question?—A. With the exception of these coarse freights to which you have alluded, with the exception of some iron ore and some other things—stone, coal, and iron—the canal is not the factor that it was in 1882.

Q. In other words, at high rates it has been demonstrated, has it not, that the rail carriers to New York and Philadelphia and Baltimore can, as against the canal, take substantially all the traffic, both east-bound and west-bound, except those articles which you have mentioned?—A. Well, that depends upon the relative difference in rates.

Q. I say at rates slightly higher than canal rates. Of course there is a limit beyond which you can not raise the rates without invoking canal competition.—A. Yes, sir.

Mr. KERNAN. That is all, I think.

Cross-examination by Mr. LOOMIS:

Q. Mr. Blanchard, I am told that the existing rate on wheat and oats from Chicago to New York is 20 cents per hundred. Is that right?—A. Yes, sir.

Q. And at the existing rate on the same commodities Chicago to

Newport News is 17 cents per hundred. Is that right?—A. Yes, sir; and to Baltimore.

Q. I am told that the rate from Chicago to Newport News is made by the publishing and filing with the Interstate Commerce Commission, and at other places as required by law, of a tariff by the company called the Big Four and the acceptance of that tariff by the Chesapeake and Ohio Railroad Company, reaching to Newport News. Is that right?—A. Yes, sir; the Cleveland, Columbus, Cincinnati and Chicago road, which is called the Big Four.

Q. And the Chesapeake and Ohio?—A. Yes, sir.

Q. The first-named company issues a tariff showing this?—A. Yes, sir.

Q. And the second company accepts it?—A. Yes, sir.

Q. Now, that rate continues until these two companies change it. Is not that so?—A. Their understanding is that they will issue the same differentials to Newport News that have been heretofore granted under this arrangement to Baltimore.

Q. These two companies could diminish that rate if they saw fit, could they not?—A. Both the Chesapeake and Ohio and the Big Four roads are members of our organization and can not diminish it against the recommendation of the managers except on notice of the board of directors of these companies.

Q. Well, if the boards of directors of the two companies saw fit to diminish that rate they could do it, couldn't they?—A. Yes, sir.

Q. And there is nothing in the Joint Traffic Association to prevent their doing it?—A. Nothing at all.

Q. And I suppose it might be assumed that if the rate was diminished to say 15 cents per hundred, and there was an inducement in it to the two companies named, they might be expected to do it. Is not that so?—A. Yes, sir.

Q. And those two companies could increase this rate from 17 cents to 20 cents, the New York rate, could not they?—A. Yes, sir.

Q. So far as the physical act is concerned there is no legal obstacle to prevent them; all they would have to do would be to make the new tariff and publish it and file it where by law it is required to be filed, accepting the 20 cent rate. Is not that so?—A. That is true.

Q. There is nothing in the Joint Traffic Association agreement or the administration of it to prevent their doing that?—A. Not a line.

Q. The same thing is true as to all these other petitioners?—A. Equally true, naturally, at all ports by all routes.

Q. The line from Chicago to Boston is composed in part of the Boston and Albany and the New York Central, and then the New York Central's western connections?—A. Yes, sir.

Q. These companies have not any control of the routes from Chicago to Newport News or to Philadelphia or to Baltimore, have they?—A. None whatever.

Q. Now, the board of managers that considered this subject, that board consists of ten members?—A. Yes, sir.

Q. Representatives of the different companies, members of the association?—A. Representatives of the ten systems, as they are called.

Q. Ten systems embracing several companies in each system?—A. Yes, sir.

Q. And they have considered this very subject, I understood you to say?—A. On two different occasions they have had the subject up and given it preliminary examination. They have had one or possibly two discussions with steamship companies and the Produce Exchange.

Q. And this board of managers has power to make recommendations?—A. Only recommendations.

Q. On the subject?—A. Yes, sir.

Q. Now, when you said that it was one of the principal objects of this association to maintain rates, did you mean by that to prevent secret reductions, cutting by rebates, etc.—is that what you meant?—A. After a tariff has been published by the companies and filed according to law, with due notice as required by law, it is the purpose of our association to prevent any undue or irregular methods which will deplete that tariff.

Q. You did not, then, mean that its object was to maintain any particular rate for any particular period, whether high or low?—A. Not at all; we make no rates. We endeavor to maintain those that are made by the railroad companies, in the exercise of their power.

Q. According to the published tariff, open to everybody?—A. The contract so states.

Q. And not to make rates which would result in an undue advantage and preference to one locality or to one individual; is that it?—A. That is the purpose of the association.

Mr. LOOMIS. That is all, sir.

Mr. FISHER. If your honors please, I would like, inasmuch as Mr. Blanchard has been requested by the petitioner's counsel to furnish some further statements—and of course these must be furnished—on the part of my colleague to reserve the right of asking any questions until after that time, especially, if your honors please, as, after the petitioner has completed his examination, we propose to ask the commission for an adjournment. Your honors will see, of course, the propriety and the necessity really for an adjournment. Probably the suggestion has occurred to the minds of the commissioners without any suggestion on my part.

Commissioner KNAPP. Will you say what there is, what the further information is, which Mr. Blanchard is expected to furnish, and, in connection with that, the time within which he can conveniently do it?

Mr. KERNAN. I understand Mr. Blanchard to say he could give us the distribution of traffic through these six ports originating at Buffalo and Erie and Fairport, and also as to Chicago traffic, but that he could not go further than that. Is not that so? Could not go to Duluth—you could not do that?

Mr. BLANCHARD. No, sir. What six ports have you reference to?

Mr. KERNAN. New York, Boston, Philadelphia, Baltimore, Newport News, and Norfolk.

A. I can not give you Norfolk; that is the reason I asked you.

Mr. KERNAN. All right; the five ports, then.

A. Yes, sir.

Mr. FISHER. What year did you ask for?

Mr. KERNAN. Why, the year 1896; yes, sir.

Mr. SHERMAN HOAR. I would like to have you include some ports north of Boston in that.

Mr. BLANCHARD. I think we can give Montreal and Portland.

Mr. BLACKMAR. Can you give St. Johns?

A. I can not state whether St. Johns is stated separately or not, or in the agreement with Montreal.

Mr. BLACKMAR. But if you can.

A. Yes, sir; I will do it; I understand it is the desire of the commission and I will do so.

Mr. FISHER. You can just as well furnish that information for 1894 and 1895 as 1896?

A. No, sir; the trunk lines did not keep any through data in those years as they did in 1896. I can give you such statements as were prepared for 1894 and 1895.

Mr. FISHER. They would be only partial?

A. I can state them as far as they go. I would like to be accurate in my statements. I can not say now how far I can go in them, but in 1896 we can give it all right.

Mr. KERNAN. Ought not it to show separately for domestic consumption and export?

A. We have no means of stating that. You will find it in the Chicago statement for the entire year, which I understand the commission desire furnished, and I would like to say that we will be very happy to furnish any of these things at any time, but also desire to say that there is no certainty as to these data. There is a note appearing on each one of these statements showing the exports by weeks, but there is this difficulty that I would like to refer to in that connection, and that is where traffic is consigned for export, in some instances, a higher rate may be paid, as, for example, the grain to-day which would appear in the Chicago-rate report as export traffic, when it comes here it may be used in domestic consumption, and it may be delivered at the higher rate; the reverse of that is equally true. So that the statement that will appear will only indicate the traffic as it left Chicago, and intended to be exported or for domestic consumption at that time. The same is true, I think, of Boston. That is, that traffic consigned there locally may be exported. I think Mr. Mills, sir, who appeared before you yesterday, can testify to the correctness of that.

Mr. BOND. You can cover, in these statements, other articles besides grain, can you not?

A. The statements that are referred to from Chicago cover everything—show the traffic not only in grain, but the same conditions of the traffic in cotton and iron ore, etc.

Commissioner KNAPP. Now, we understand that it is the desire of the gentlemen to postpone the further examination of Mr. Blanchard until after these statements are furnished. Is that the fact?

Mr. FISHER. Yes, sir.

Commissioner KNAPP. Within what time will it be convenient for you to furnish them?

A. I will let you know by 2 o'clock. I think I can get the most of them for you by to-morrow morning.

Mr. KERNAN. How would it be, Mr. Blanchard, if we should ask you to furnish the same thing from St. Louis and Cincinnati? Would not we then have this complete?

A. We could give you as much as we have from St. Louis and Cincinnati. I would say that the Chicago and Alton and other roads—south of the Ohio River—have not always reported throughout the year.

Mr. FISHER. Then it would be, as far as Cincinnati and St. Louis are concerned, entirely incomplete?

A. I would not state that. Some of these data have differed at different periods. One company might stop its reports in June, and the other in September, and we would not be able to tell you anything about them, except for the period when all reported alike.

Q. Then it would be only a partial statement?—A. Yes, sir; when I furnish that, it would be a partial statement.

Q. Then it would be misleading?—A. Yes, sir; it would be misleading; it would be complete for various months, when all were reporting. If it is desired we could furnish that.

Mr. KERNAN. We have, your honors, a witness or two more in the same line that we have been calling them, regarding grain, flour, etc., and I am not altogether certain but what, after we conclude these, that that will pretty much exhaust our testimony and take up the balance of to-day. I think it might perhaps be as well to take the adjournment then, if we are going to take one.

Commissioner KNAPP. I was about to inquire whether you gentlemen would be prepared to continue your examination of Mr. Blanchard immediately after he furnished that information. It occurred to me that perhaps you would want some opportunity to examine those figures.

Mr. FISHER. We would undoubtedly, if your honors please.

Mr. KERNAN. I have no objection to that. I think after we call two or three witnesses more, that will exhaust the day and perhaps it will accommodate everybody and be convenient to your honors to take the adjournment then instead of proceeding to call other witnesses.

Mr. LOOMIS. What adjournment are you speaking of, the recess or what?

Mr. FISHER. You propose at the end of the day, although you have not completed the examination of your witnesses, to ask for an adjournment of your side of the case?

Mr. KERNAN. I will then have completed all the examination except your witnesses.

Mr. FISHER. You do not propose to announce, then, that you have finished your case?

Mr. KERNAN. We may determine to put the traffic managers on the stand and examine them, but it is hardly worth while to take up that part of the examination at this time of the week, because we could not finish the examination, but we will substantially have completed all of the class of evidence that we have been going over; we have been looking over our own witnesses, and we think we have nearly finished. And then there will only remain such further investigation as may be made by the examination of such witnesses as Mr. Blanchard and others, who are familiar with this railroad question.

Commissioner KNAPP. Do we infer from that that you propose an adjournment at the close of the hearing to-day?

Mr. KERNAN. I think if one is to be taken this week it had better be taken then.

Commissioner KNAPP. It will be out of the question to finish the hearing of this case this week.

Mr. KERNAN. I do not think it can be done.

Commissioner KNAPP. There must, then, be an adjournment to some future time?

Mr. KERNAN. Yes, sir.

Mr. FISHER. In respect to the adjournment, if your honors please, your honors can see, of course, from the nature of these statistics, that they have been furnished by the other side, and the times that they have been furnished to us here, that we have had no time for the purpose of making any inspection. It has really been impossible to do it; and Mr. Kernan, I think, stated yesterday or the day before that, although we had had some months to prepare for the trial of this petition and for the preparation of these statistics, he had found that time too short even for himself.

Mr. KERNAN. I said a couple of weeks' notice of the hearing in which to do it, which was too short.

Mr. FISHER. Well, it is quite apparent, from the testimony that has been produced, that the committee of the Produce Exchange has had this matter in contemplation for a long period of time and the prepara-

tion of these statistics has gone on right along. Now, there ought to be some reasonable corresponding time to enable the respondents on their part to investigate the facts which are set out in the statistics and to produce such statistics as they want; and it seems to me, if your honors please, that an adjournment of six weeks or two months would be a reasonable adjournment, in view of the magnitude of the inspection which it is necessary to make.

Mr. KERNAN. Well, I do not think the investigation ought to be postponed as far as that, hardly. It ought to be a matter of two or three weeks, or something of that sort.

Mr. BOND. You remember we live at outports, Mr. Kernan.

Mr. PETTIT. Your honors must recollect that the information contained in these statistics is so voluminous that we have got to get people to look this up pretty thoroughly.

Mr. KERNAN. We will get you any information.

Mr. BLACKMAR. They have such admirable lawyers on the other side that they don't need anything to help them in the way of this information. My friend Pettit here is a first-class statistician. I know that from my own experience.

Mr. BLANCHARD. Mr. Kernan, do you want anything more with me?

Mr. KERNAN. I think that is all to-day; I am much obliged to you.

Commissioner KNAPP. Possibly we may assume that you gentlemen will confer and agree upon an adjourned date or a time for taking up this case for a further hearing; and in order to facilitate you I will say that the commission is now under engagement to take up some cases through the South, beginning on the 5th of April at Savannah, which will require probably the most of the month of April, so that unless further testimony can be taken in this case next week and the early part of the following week the commission will not be able to assign you a date until after the 1st of May.

Mr. KERNAN. We can be ready to close the case and would be very glad to do it next week; and at the same time I recognize that there is reason in the suggestion which has been made by the other side, so that I have no objection to a reasonable adjournment, say to the first part of May, and in that case with the full understanding that when we meet then we will close it.

Mr. FISHER. Well, we will agree to that.

Mr. KERNAN. I should say that we ought to have an understanding to that effect, and then we should all be here prepared to close it, because we would not want to have the hearing left over to have it during the summer term.

Commissioner KNAPP. With reference to the date of further hearing, I can only say ahead that we will not be able to assign a date during the month of April. It is probable we can take up the case for a further hearing almost any day after the 1st of May, during that month, but we appear now to be obliged to be in Chicago in June, so that about all the time we have at our disposal to visit New York in this case is this coming week, the first part of next week, and the month of May. Of course we can accommodate ourselves for a day or two, one way or the other.

Mr. KERNAN. If agreeable to the commission, why not say the 3d of May, which is Monday, and then the commission would expect to devote as much time during the week as would be necessary to close the evidence.

Commissioner KNAPP. It occurs to us to say that it might be safer to name the 10th of May than the 3d.

Mr. KERNAN. I think we can agree to that

Commissioner KNAPP. The second Monday instead of the first.

Mr. KERNAN. Yes, sir; then we will understand it to be the 10th of May.

Mr. FISHER. The 10th of May.

Mr. PETTIT. Where will your honors sit at that time? Probably as this covers a considerable extent and section of country, and where parties interested would be liable to come from all localities, it seems to some of us that probably Philadelphia would be a more central point than New York to hear the witnesses that we will want to call on behalf of these commercial interests; they will have to come from as far as Newport News south, and as far as Boston. Your honors will have the United States court rooms there, and you will find them very comfortable and convenient, and it would be nearer the center of the case.

Mr. KERNAN. The seat of the difficulty.

Mr. PETTIT. Yes, sir; nearer the seat of difficulty.

Commissioner KNAPP. I understand, then, that there is to be an adjournment after to-day, but that you will call two or three other witnesses this afternoon?

Mr. KERNAN. Yes, sir; we will fill up the day.

Commissioner KNAPP. You will fill up the day. And now, then, during the recess for luncheon, perhaps you gentlemen can agree as to where the next sessions are to be. If not, we will have to fix a place.

Mr. KERNAN. Perhaps so, and in regard to that I want to say to you that I think this hearing has demonstrated that no more convenient place for everybody can be found than here. All the testimony has shown that all of the large export business that we are talking about is controlled here in New York, and that it is represented by the houses here. There is nothing else to talk about, substantially.

Commissioner KNAPP. I am only suggesting to you that you take that into consideration with the view of attempting to agree among yourselves. If you can not agree among yourselves, of course we will agree among ourselves. We will let that matter stand until after the recess. I want to ask Mr. Blanchard a question or two. You will kindly remain in session now until some questions can be asked Mr. Blanchard.

Commissioner CLEMENTS. I understood you to say that the rates were maintained equally as well for a year or fifteen months after the interstate-commerce law was passed as during 1896. Am I correct?

A. Yes; that is my impression.

Q. The same differentials existed then as do now, did they not?—A. Yes.

Q. You further stated, I believe, that it was your belief and your observation, from facts that have come into your possession, that tariff rates—established tariff rates—had been better maintained in 1896 than any other year except the period you referred to?—A. Yes, sir; since 1887.

Q. Now, does that statement have reference to tariff rates outside of the Joint Traffic Association?—A. I have no knowledge of any other rates.

Q. You only apply that statement to your own roads?—A. Yes, sir; to our own territory.

Q. Are there some roads that carry to Newport News and Baltimore and Norfolk and Boston that are not members of your association?—A. Taking the South, only a little business which goes to Norfolk by way of the Chesapeake and Ohio road was included; the Norfolk and Western was not included, and they carry considerable traffic from St. Louis that was not included in that statement. My statement was only as to the

roads in our association; the road which leads to Newport News is in the association, all the lines to Baltimore, all the lines from the West to Philadelphia, New York, and Boston, except the routes of the Canadian Pacific. They are all included in my statement except these. The Canadian Pacific appointed a manager on the board in June last, but their traffic only includes that business which passes from points in the United States at the present time south of Sudbury, which is the junction of their Pacific Coast line. Traffic passing through Sudbury from the Pacific Coast is not included in it. Traffic originating at points in the United States and passing through Sudbury has been included, but not in the statement; it is included in the rates which they publish.

Q. From your observation and knowledge of the facts, do you have the same belief as to the maintenance of rates to the Southern ports by way of the South?—A. By way of the South?

Q. As to this port?—A. My observation is that they have not maintained the same rates through the Southern ports.

Q. You mean they have not maintained the published rates?—A. I mean they have not maintained the published rates—that is my belief; that is, not published tariffs of which I have knowledge. I speak of grain rates more particularly of Galveston and New Orleans and the opening of certain new lines such as the Asheville route, and so on.

Q. That leads to Newport News?—A. No, sir; that does not lead to Newport News, but to New York by steamer connections.

Q. From what point?—A. They leave from Savannah.

Q. It is your belief, then, from these facts which you observe, that while the differential exists as stated the roads carrying directly to New York are maintaining the rates, and the others, leading to the Southern ports, are not?—A. My observation is clearly to that effect.

Q. To what effect?—A. That the rates of the Joint Traffic Association were, during 1896, substantially maintained. My information as to the Southern rates is derived so much from hearsay that I would not like to say anything more than that I have information to the effect that freight rates have not been so regular and that these companies have not maintained our rates, although they may have maintained the rates which they have made themselves, about which I do not know.

Q. Then it would not follow that the change in the business was due to the published differentials, or agreed differentials, from that statement?—A. No, sir.

Mr. FISHER. You are speaking of the Gulf port roads, are you—the roads leading to the Gulf ports?

A. Yes, sir; and by way of the coast below Norfolk.

Mr. FISHER. You are speaking of the Southern roads?

A. Yes, sir.

Mr. BLACKMAR. You do not include the roads to Baltimore and Newport News?

A. No, sir; I am speaking of points south of Newport News and Norfolk.

Mr. SHERMAN HOAR. When you said that all the roads to Boston were members of the Joint Traffic Association, that statement should be qualified by omitting the Boston and Albany Railroad, should it not?

A. I meant that the New England lines are not members of the association, but that their connecting lines running to the Hudson River are members of the association, and we have received their cooperation in the purposes I have recited.

Commissioner CLEMENTS. In speaking of the shipment of grain from

the West, you mentioned Chicago as a basing point coming through to the Atlantic ports. Is it not true, since the improving of the harbors at Galveston and Newport News and Norfolk, that much of the grain in the territory of Kansas and Nebraska that formerly came this way now take the nearer and more direct way to these Gulf ports?

A. There is a larger proportion of grain going to the Gulf ports now than before these lines had their facilities. Then it went through Chicago or St. Louis or Peoria, but since the improvement of their facilities at Galveston, the improvements of the Galveston harbor, the erection of the elevators and the construction of facilities at New Orleans, that has been the means of taking considerable additional traffic to these two points. They are the natural outlets for that section of the territory, and are entitled to their division of the business, as much so as Baltimore is entitled to its share as compared with New York.

Q. At the same rates, traffic will ordinarily move by the shortest routes?—A. Well, that depends; the shortest route may be to the Gulf, and then the sea route may be longer. It may be the shortest route to the Gulf, and then it goes by sea, and it may be the longest route from the same point in the West to Liverpool. It follows that the traffic must always follow the shortest entire route, and, indeed, much of the traffic that has gone by way of Galveston, while it may be the shortest route there, when it comes to the foreign destination it is the longest mileage to that ultimate destination.

Q. The ultimate destination?—A. Yes, sir.

Q. Where the rail-line part of it is shorter?—A. Yes, sir; where the rail-line part of it is shorter. To illustrate that question, it happens to be the same distance to a mile, I believe, from Chicago to New Orleans by the Illinois Central as it is from Chicago to New York by the Pennsylvania. Now, while these distances are increased to St. Louis, so that the basis of our rates to St. Louis is 116 per cent of the Chicago rate, the Illinois Central reverses that proposition. It is 796 against 918 miles, and the result is that they are able to make less rates from East St. Louis to New Orleans, while our proportionate rates have always been higher from East St. Louis than from Chicago. I recite that as one of the complications entering into this proposition. Now, when we get west of the Mississippi River (and our association does not extend beyond it), and in the grain-producing regions of Kansas and Nebraska, there are increased rates to all ports from Norfolk to Montreal as compared with New Orleans and Galveston, so that there has been no attempt on the part of our lines to do more than adjust their rates to new commercial conditions, in a general way recognizing, as I believe all the members do, that those parts are entitled to their reasonable share of the original business.

Commissioner CLEMENTS. Since the better development of these ports by elevators and shipping facilities, deeper water in the manner you speak of, does not a great deal of grain come from northern Texas and Nebraska and Kansas there that formerly went to Chicago?

A. Yes, sir; undoubtedly.

Q. Did not it formerly go from northern Texas to the Atlantic ports?—A. There were some very small quantities of grain. Northern Texas used to supply the South through the Memphis and Vicksburg gateways. They did not send so much north. Some of it was milled at East St. Louis, but what was necessary to be sent to this very large consuming district in the interior, in the interior of New York, the State of Pennsylvania, and so on, why, naturally, that came through the Chicago gateways.

Q. How are the shipping facilities from the Gulf ports with respect to the frequency of vessels going and obtaining tonnage for shipments from these ports as compared with New York?—A. I can not say as to that at all. I have never seen the comparative lists of sailings. They are easily accessible, but they are much less frequent than they are from New York.

Q. Now, have not ocean rates diminished over former years—considerably diminished from both Galveston and New Orleans and diminished from Newport News and Norfolk?—A. Yes, sir; all these seaport cities.

Q. And New York also?—A. Yes, sir.

Q. And Boston?—A. Yes, sir.

Q. And about in the same proportion?—A. Well, I can not answer for the Southern ports at all—nothing south of Norfolk or Newport News—but the impression arrived at from current reports furnished by agents of ships is to the effect generally that the reduction of rates has been greater on ocean freights from points south of New York than it has been from New York and points north of it.

Q. Are there more lines than there were formerly between these ports?—A. There has been an increase of lines to the South as compared with those of New York—a larger percentage—and the sailings have been increased from these Southern ports more than from New York or Boston.

Q. Can you tell whether or not the terminal charges—the term called here "port charges"—incident to this harbor in shipping from New York have been increased or diminished since the period you allude to—1886 and 1887?—A. I have no knowledge on that subject at all.

Q. You have not?—A. No, sir; it does not come under me; or does not come into my possession.

Q. You said, if I understood you correctly, to illustrate, that the Big Four Railroad and the Chesapeake and Ohio could at any time, notwithstanding their membership in the Joint Traffic Association, reduce their rate. You meant to say by that, I suppose, that under the law they can do it if they choose to do it?—A. They can do it both under the law and under the contract with the traffic association.

Q. Do I understand you to say that they can be members of that association and parties to that agreement and obey all of its rules, and at the same time independently act for themselves without consulting the other members of the association, and reduce their tariff?—A. I want to draw a distinction between the rates of the association and its rules. By the terms of the contract the board of managers make recommendations to the various companies comprising the association and put a clause in the contract, to which I refer you, in which it is distinctly provided that if any company dissents from the recommendations of the managers, they can, by action of their board of directors, duly notify the board of managers of their dissent from those rates and publish other rates. Now, that dissent naturally relates to lower rates, because they would not make any dissent to higher rates; therefore they have a right, as far as that goes, but when it comes to the rules applicable to rates and classifications, certain rules govern traffic from origin points, in Chicago, to points of delivery, at seaport points, to certain intermediate points, etc., and in that condition such rules would remain in force, but the rate-making power of the board of directors of the company is entirely reserved in every respect by the contract.

Q. Now, suppose these two systems should want to reduce their rates to Norfolk to 15 cents, and being members of your association and

desiring to live up to their agreement in every way, what step would they first take?—A. They would simply give us the notice provided in the clause of the contract to which I have referred. Then the contract provides that the managers shall consider the steps necessary for the adequate protection of the other members.

Q. What steps are provided for by the other roads?—A. There are no steps provided for by the other roads, except if the rate was reduced to Norfork or Newport News to-day by the Chesapeake and Ohio road to 15 cents, there is no reasonable doubt that the rate would be immediately reduced to Boston, New York, Philadelphia, and Montreal to correspond with it.

Q. Is there not some application to your board that precedes any notice that they would give?—A. They would come to us; there is a provision in the contract, and also in the practice of the association, that if they dissented from the rate they would be invited before us to state their case, and be gladly welcomed, and then, if they still adhere to that then their recourse is as provided.

Commissioner PROUTY. If we take any action on this, of course we want to get at some basis on which that action should be based. Now, what do you say is the purpose of these differentials?

A. The purpose of the differentials originally, and as perpetuated in somewhat modified forms, is to make the rates from the Western producing centers forwarding to European points of consumption substantially alike, not on through bills of lading especially, but in the aggregate of the charges.

Q. Having Chicago as one point representative of the Western points and Liverpool as another point representative of the foreign ports, the object of the differential is to make the rate from Chicago to Liverpool through all the ports the same?—A. Substantially.

Q. And if you accomplish that purpose it is not any part your purpose to see whether the proper amount of traffic goes one way or the other? All you aim to do is to keep the actual rate, the actual cost of that transportation, the same?—A. That is just the case exactly, the proposal being that if the through freight rates are the same the European buyer and the American seller, and all intermediate commission agents, etc., would be left entirely free and untrammeled to choose their own route, and uninfluenced by the action of the different railroads.

Q. You would not, then, in determining a differential, consider the claims of New York, Boston, Baltimore, Philadelphia, or Norfolk? That has not anything to do with it so long as the rate through each port is the same?—A. Substantially, that is correct.

Q. When was this present differential fixed?—A. The present differential was fixed by a decision of Judge Cooley and Senators Washburn and Thurman in 1882.

Mr. PETTIT. Did not they simply ratify?

A. No; the contest which had been going on between Mr. Vanderbilt and the New York lines on the one side and the Southern lines on the other resulted in such irregular rates that there were no accurate differentials at all, and as a result of that decision a meeting was held at the Brevoort House at which each agent agreed to make certain modifications, but the time when the railroads finally decided it and which the presidents affirmed was in 1882.

Commissioner PROUTY. The testimony before us is that on cargo lots the ocean rates from the five ports are substantially the same. Is that your understanding of the matter?

A. We are now collating and endeavoring to get the information

together, myself and my colleagues, to ascertain what these rates are. The information that has come to the office is that they vary greatly in that respect. Of course, the ocean rates are fixed more squarely in reference to grain, but with reference to other cargoes, such as provisions and cotton, etc., they are not. All these questions have to be taken into account as they come up, but as to the cargo question to which you refer, I stated a little while ago that our information is particularly to the effect that the reduction in the Southern ports has been greater in the Virginia ports during the period since the passage of the law. Of course, that is only from hearsay; I have no other means of knowing.

Q. The testimony before us tends to show that the cargo rates on grain from the five ports is identically the same; and if that were so, and the grain was all carried abroad in cargo lots, there ought to be no differentials at either place.—A. If all the other conditions and circumstances were alike—harbor charges, I would say, terminal charges, and all that sort of thing—that would be the theory upon which rates are constructed.

Q. Now, in point of fact, grain is sometimes carried abroad at berth rates and sometimes at cargo rates. I have here a table which shows that in 1882 there was a certain difference between the berth rates for New York and Philadelphia and Baltimore. That table shows that in 1896 that difference is substantially eliminated; it is about the same now. Now, if in point of fact there has been a shrinkage in this difference, there ought to be a corresponding shrinkage in the differentials if everything else continues the same?—A. There ought to be a classification; I can not say what that should be, but that ought to be the theory in the application of these rates, in the formation of these rates.

Commissioner CLEMENTS. You have said, in answer to a question of Mr. Loomis, I believe, that the purpose of the maintenance of rates as expressed in the joint traffic agreements, and which is the object of your association, has reference to the maintenance of rates established and published under the law?

A. Yes, that is the amount of it; yes, sir.

Q. That is the purpose of it?—A. That is the purpose of it.

Q. Do we understand you by that to mean to say that one purpose of it is not to maintain the rates agreed upon by the association, with its machinery for making rates—competitive rates to points on all the lines—and that the maintenance of the rate meant is the maintenance of the rate that the association makes or authorizes or agrees to?—A. The purpose of the association perhaps I can state a little more clearly than I have yet. At a point like Chicago, where there are ten eastbound railroads, some conference as to the maintenance of rates is essential to commercial equity and fairness at that point. There is no difference between having ten rates on ten railroads and ten rates on one railroad, so far as the advantage or the ruin of the commercial houses is concerned; therefore the essential parity of rates must be determined by conference and agreement. For that purpose we will suppose the application made to-day—and I would like to say that we have now applied between four and five thousand commodity rates between the East and West where the roads reduced the class rate. That application, whatever its nature may be, whether to eliminate a commodity rate which we thought too low or lower one which the shipper thought too high, is brought before our board. There being two independent associations east and west of Buffalo and Pittsburg and Toledo and Wheeling, the rates are referred by me to the commissioners

of these respective associations to be laid before all those lines, and all those lines cast their written ballots as to what they favor. The aggregation of these ballots is brought to our office, tabulated, and laid before the board of managers as the conclusion of the railroad companies in that respect.

In some cases those recommendations are adopted and in a great many not, and when it is sent out it is sent out in the form of a recommendation, a circular of which I shall be very glad to furnish the commission, simply saying, in every case, the managers recommend so and so. Now, by the terms of this contract, after that rate is made in that way, with the necessity for a published uniform standard, then the machinery of our association is used, so far as it can be done, to maintain that rate, provided the railroad companies accept the conclusions of the managers, and if it is reasonable and proper it is published and filed according to law. A copy of the tariff in our association territory is filed with me at the same time it is with your honorable board, as I understand, and the object of our association is to act as the right arm of your organization and make the same efforts to maintain those rates. Now, as to making those rates, I think I have correctly described the basis. As to the great mass of all these rates, of which there are now in our territory more than 600,000, operating between 4,000 Western points and 7,000 Eastern destinations, with all the complications resulting from all that work we have simply adopted this basis.

When the law went into effect the east-bound freight rate from Chicago to New York on first class was 75 cents; the west-bound freight rate was $1. The railroad companies met and, pursuant to the conditions of the law and their understanding of it, reduced the west-bound freight in every case, although it was on a different class of goods, more valuable, to the same basis as the east bound. That is now the basis of the rate. In other words, the units or pivotal points are New York in the East and Chicago in the West, they having been reduced to those standards and having intermediate or fluctuating rates for traffic of exceptional character—dressed beef, grain, cotton, wool, live stock, meats, and so on. These rates are from time to time changed, but the class rates are supposed to remain substantially where they were at the time of the passage of the act. They have never been challenged by the public, or if they have been, only in isolated cases. As to the application of the rule between certain points, they have been granted hearings before the Trunk Line Association and the Central Traffic Association, and we welcome these hearings and are always glad to have them. The rates, then, as between Cincinnati and Indianapolis are a percentage of Chicago, and have reference to distance. Where the distance is more it is increased, as to St. Louis, where it is 116 per cent, and at Peoria 110. The Boston rate for export is the same, with certain differentials on classes for local consumption higher. Philadelphia is made 2 cents less on grain and Baltimore 3. Then those differentials are carried down through the interior of Illinois and other States—Peoria, Vincennes, Cairo, Cincinnati, Indianapolis, etc., that being substantially the basis of rate making.

Now, from that basis the Joint Traffic Association has rarely departed, because it has been the result of the evolution of rates, as I may say, and the result of the reductions of rates on cotton, within my limited experience, has been from $5 per 100 pounds to 57 cents from East St. Louis; on flour, from $2.55 per barrel to 58 cents from St. Louis to Boston, and west bound on dry goods from $2.50 from New York to Chicago to 75 cents; the rate on cheese from Buffalo has been reduced

from $1.50 per 100 pounds to New York to where it is to-day, say, 20 cents. Now, in the reduction of these rates, there being some point at which it must stop, a reasonable uniformity of procedure is essential. The railroads did meet and make these rates in the way that I have specified. They are always glad to entertain any questions as to the reasonableness of these rates, but admitting them to be reasonable we have regarded it as fair to the public, under the common law and the law organizing this body, under our own organization, to do everything in our power to maintain them and prevent unfair, unreasonable, and secret preferences in the maintenance of those rates.

Commissioner CLEMENTS. Then I infer from all you have said that you do not wish to be understood as limiting the term, or expression "maintenance of rates," as the purpose of your association, but simply to enforce the maintenance of rates that have been published under the interstate-commerce law.

A. If I left any other impression with you I am very glad of the opportunity to correct it.

Commissioner CLEMENTS. It includes the making of what your association believes to be right, so far as the rates are concerned, and an adherence to them after being made?

A. That is true; and there is one feature in the making of our rates as to which I would like, if you will permit me, to make a statement. We have, for example, a committee consisting of twenty-three officers of the lines representing all the steel rail interests in the country which is engaged in making through reduced rates on steel rails commensurate with the reductions that have been made in the price of steel rails. All articles of steel and iron manufacture our classification calls for fourth class, small quantities, and fifth class in carloads. Last week we reduced that entire classification all over the territory to expire at the end of navigation—one class in all directions; that was the result of this conference. But now having agreed upon rates as the result of this conference and the commercial conditions of this country, our association will bend all of its efforts to the maintenance of this reduced standard of rates.

Commissioner CLEMENTS. What I wanted to know is whether we are to understand that you, in purpose as expressed, of maintaining rates—whether that includes the holding up of rates to a standard which you want to enforce, as well as the adherence to them after they are made and published?

A. That includes the revision of rates from time to time after their determination, and then their maintenance.

Q. Don't you exercise any influence through this association to prevent any individual line reducing the rate below the points where the other lines would be willing to compete?—A. Yes, sir; we would ask for a conference and go over the matter.

Commissioner CLEMENTS. And the whole machinery is with a view of that as well as for the purpose of maintaining the rates after they are published?

A. Yes, sir. Now, our reduction on corn from 20 cents to 15 cents was the result of a conference of that character.

Commissioner PROUTY. Do you think these remarkable reductions would have taken place if there had been a joint traffic association all the way through?

A. I do not think the association has any effect except to maintain rates which commercial conditions require after they are established.

Commissioner PROUTY. You think this is for the benefit of the merchants, then?

A. I think so; I never heard of any complaint.

Mr. BOND. I would be glad if you would state the rate conditions in Nebraska and Kansas and the Southwestern corn belt during the last season as regards the rates to Gulf ports and Atlantic ports?

A. Can you be a little more explicit?

Q. I mean, what were the comparative rates for that district—just the rate?—A. Generally speaking, I have not this from any knowledge which would enable me to bring it under my oath to give correct testimony, but I understand that practically the pivotal point of that matter is that the Illinois Central has made a rate from East St. Louis to New Orleans; and assuming that it is at this time 11 cents, which I believe to be the fact, that rate is made on about parallel points west of there south of Galveston. That is the general plan, as I understand, but it is misleading with regard to the Gulf ports—but that is only hearsay—so that the farther west you get the rate remains the same to the Gulf ports, but increases the rate by way of St. Louis, Peoria, and Chicago to the Eastern ports. It is an extremely difficult geographical question to meet and consider.

Commissioner CLEMENTS. What I wanted to get at was the comparison between the operation of the Gulf rates in that territory and the Joint Traffic Association rates.

A. Their rates are very much lower. Does that answer your question?

Commissioner CLEMENTS. I wanted to know what they were, the actual rates.

A. Assuming that the rates from Neosha, Kans., to Galveston to-day is, say, 12 cents a hundred, and the rate from the same point to East St. Louis is 7 cents a hundred, our rate east of East St. Louis would be 20 cents to Baltimore and 23 cents to New York on wheat; it would be 23 and 7, or 30, against their rate of 11, 12, or 15, as the case may be, from some of these group points. From a number of these points their rates to Galveston are, substantially, in some cases, one-half from the grain-producing regions of Kansas and Nebraska of what they are to New York.

Commissioner KNAPP. If there is nothing further from Mr. Blanchard, he will be excused.

We will now take a recess until 2 o'clock.

(The foregoing testimony of Mr. Blanchard was taken upon the first hearing of the case in the city of New York. Subsequently, at an adjourned hearing in Washington, Mr. Blanchard was further examined, and upon that examination gave the following testimony, which is more or less in reference to the Joint Traffic Association. After his testimony had been concluded and the hearing adjourned, he addressed to the commission the letter of which a copy is given in connection with this testimony. In response to this letter he was notified that it would be placed on file with his testimony, to which it related.)

Mr. KERNAN. I want to ask Mr. Blanchard one other question. This table put in evidence by the defendant just now as to east-bound tonnage and west-bound, could you have that verified as to the figures it contains and continued down to the present time from the records of the Joint Traffic Association?

Mr. BLANCHARD. I think so. I think there has been no change in the methods since I have been there, which is since the 1st of January, 1896. My impression is I could verify this very promptly.

* * * * * * *

Mr. KERNAN. One other question. In your testimony on page 451 I see that you state that "when the managers recommend any rate or fare, a circular embodying that action is issued by me as an officer of the managers, as provided in that contract." Can you state to what extent circulars have been issued under that provision in accordance with that suggestion?

Mr. BLANCHARD. That relates only to freight matters?

Mr. KERNAN. I only wanted it as to freight, not fares.

Mr. BLANCHARD. About 1,200 circulars have been issued, I think—freight circulars, relating to freight matters.

Mr. KERNAN. Of these how many would relate to the rates we are investigating here between Chicago and points in the West, taking Chicago as the basis of rates to the seaboard upon these commodities, grain commodities?

Mr. BLANCHARD. I could not tell without going through a great number of them.

Mr. KERNAN. Would it be practicable for you to give us those as a supplement to your testimony?

Mr. BLANCHARD. These east-bound circulars?

Mr. KERNAN. I do not want to go outside of this investigation. Those which simply, in your judgment, would bear upon the question of the differential—that is, the Chicago rates and those from common points in the West to New York and the ex-lake rates.

Mr. BLANCHARD. Do I understand your question to be, would it be practicable?

Mr. KERNAN. Yes, sir. Could you give us those?

Mr. BLANCHARD. Yes, sir.

Mr. KERNAN. If you could do that I wish you would.

Mr. FISHER. Are you asking for the number of them? I did not clearly understand your question.

Mr. KERNAN. No; give us the circulars or copies of them and any changes made from time to time in reference to those differentials which we are inquiring about. If you can give us those, or a copy of them in connection with your testimony, I should be glad to have them. I did not observe that until this morning in looking over your testimony.

Mr. BLANCHARD. There is one feature I would like briefly to refer to. I am simply the custodian of those circulars. I personally favor the delivery. I stated, I believe, in my testimony, which was revised, that upon the approval of the association I would make those deliveries.

Mr. KERNAN. I assume you would present the request and be authorized to do it in the regular way. We do not want to get you into any trouble about it, and if the association authorizes you to send them, that then you advise us and send the copies in connection with your testimony. That is all I want to ask you.

The CHAIRMAN. What further is to be done with the case? I may state here that we have requested some circulars that have practically been refused to be furnished—Mr. Blanchard has—and when we see the circulars you ask for it may be all we will require. If, however, we think there are some further circulars or copies or memoranda or records of the association that are necessary, we will take such steps as we think will get them.

Mr. KERNAN. Mr. Blanchard mentioned something last night about circulars. I did not know whether it was about this matter or some other matter; but inasmuch as he mentioned something about it, we thought this would make his testimony complete so far as we cared to have it.

Mr BLANCHARD. Mr. Chairman, if I have left the impression upon your mind as is indicated by your statement, I would beg leave to correct it.

The CHAIRMAN. Undoubtedly you may do it.

Mr. BLANCHARD. To go back a little, I think the assistant secretary of the commission came to me at the close of the testimony in New York and said that it was in contemplation to ask for these circulars, and inquired whether they could be furnished. During my testimony I stated the same thing. I then had the honor to receive a letter from you, dated the 8th, asking for circulars; but the letter was of such a character that I thought it was broader than the original proposition and the circulars referred to now by Mr. Kernan. It was not intended to convey the impression of a refusal of this information. The circulars I issued relate to east-bound and west-bound matters, passenger and freight, to storage, to milling in transit, and an infinite variety of other things relating to the conditions of transportation. They refer to traffic to and from Buffalo and various other termini. The circulars on the east-bound traffic over the New York Central into Buffalo relate to State traffic. The same thing is true as to the Pennsylvania in and out of Pittsburg. And the purpose of the correspondence I had was to ask if you would kindly designate whether you wanted all those circulars or only those relating to this hearing. That was the purpose of my correspondence.

The CHAIRMAN. We wanted those circulars that you introduced in this hearing with your testimony. The complaint charges that, in respect to shipments to the seaboard, the railroads have given undue preference to other ports as against New York; and then it makes the additional charge that they have done this through this association, and in your testimony you explained that it had not; that all they had done was to make certain recommendations, which anybody might obey or disobey. Now, it occurred to us that it was barely possible you were mistaken as to the nature and effect of the circulars and what they had offered to do, and we wanted to see for ourselves what they offered to do, and to see what it amounted to; and that is what we asked for, and that is what we expect to get.

Mr. BLANCHARD. Then the inquiry from Mr. Kernan covers your demand?

The CHAIRMAN. We will see what Mr. Kernan gets. We want the circulars that relate to the charge here in this matter of giving undue preference to these other ports, and all the rates and charges that affect and apply to that question.

Mr. FISHER. When you furnish those circulars do you propose to furnish copies to counsel?

Mr. BLANCHARD. Yes, sir; we have copies.

Mr. KERNAN. When would it be convenient for you to let us have those? I ask you with reference to the time to be fixed for summing up the case.

Mr. BLANCHARD. I think I could furnished them by the close of next week. They will all need to be verified and segregated.

Commissioner PROUTY. You say that any member of the Joint Traffic Association is free to accept the recommendation of the association or not?

Mr. BLANCHARD. Yes, sir.

Commissioner PROUTY. In how many instances has any member of the Joint Traffic Association refused to accept the recommendation of the association?

Mr. BLANCHARD. None. I think there is no instance where a member has declined to accept it.

Mr. KERNAN. In connection with the last question, you stated there was a universal observation of the recommendations made——

Mr. BLANCHARD. No; I do not think I put it that way. I said in no case had we had a dissent.

Mr. KERNAN. Yes, sir; in no case a dissent. Can you state fully as to how it is that the Joint Traffic Association secures the fulfillment of the recommendations and a compliance on the part of the railroads with them? You have not covered it fully.

Mr. GREEN. I suggest to you, Mr. Kernan, that the written document will answer that question—the Joint Traffic Association agreement.

Mr. KERNAN. I only wanted to know if there is anything beyond that agreement which is used as a means of enforcing the acceptance of the decision.

Mr. BLANCHARD. The only way we have of knowing whether the recommendations are accepted are the published tariffs. The contract and the published tariffs are all the knowledge we possess.

Mr. KERNAN. Does the Joint Traffic Association agreement state all the means that are employed for the purpose of enforcing the acceptance of the recommendation?

Mr. BLANCHARD. All except the conferences from time to time held with the railroad companies and with the shippers in connection with the railroad companies.

Mr. KERNAN. I mean all the measures that can be taken by the association as against one of the members of the association who might dissent from the acceptance of the recommendation. The traffic association agreement states that?

Mr. BLANCHARD. The contract states that.

Mr. KERNAN. That is all.

ARLINGTON HOTEL, *Washington, D. C., May 20, 1897.*

Mr. E. A. MOSELEY,
Secretary Interstate Commerce Commission,
Sun Building, Washington, D. C.

DEAR SIR: I would like to make a slight correction and addition to my testimony of to-day. Upon being asked by Commissioner Prouty if any companies had dissented from the recommendations of the managers, I said I did not recall any. I would like my answer to stand as follows:

"I have no recollection of any dissent from the recommendations of the managers which has proceeded to the lengths provided in the contract of organization, by which a board of directors may decline to put into effect such recommendations, but we have received a great many dissents from the suggestions or actions of the managers in the nature of protests, requests for hearings, and for recommendations, and we have in all cases given heed and consideration thereto, and have modified a great many recommendations in accordance with such dissents."

Will you oblige by advising me at the Arlington Hotel if there are any objections to my correcting the testimony to the foregoing effect.

Very truly, yours,

G. R. BLANCHARD.

After giving his testimony upon the first hearing at New York, Mr. Blanchard requested that he might be furnished with a copy of the same for revision. He subsequently returned this testimony, to use his own language, "as revised and extended." An examination of the testimony, after being so revised and extended, exhibited some very considerable differences between that and the testimony as originally given, and these differences were so considerable that the commission has treated the stenographic report of his testimony as first written out as his testimony in the case. We append hereto a copy of his revised and extended testimony as furnished by him.

GEORGE R. BLANCHARD, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Mr. KERNAN. Where do you reside?

Mr. BLANCHARD. In New York City.

Mr. KERNAN. You are connected with the Joint Traffic Association?

Mr. BLANCHARD. I am, as its commissioner.

Mr. KERNAN. And you have occupied that position for how long?

Mr. BLANCHARD. Since the association was organized, January 1, 1896.

Mr. KERNAN. And prior to that time what experience generally had you had in railroad matters, and especially with reference to rate matters?

Mr. BLANCHARD. For about eight years I was the commissioner of the Central Traffic Association, at Chicago. Prior to that time I had occupied positions with the Erie Company as general freight agent and vice-president. Still earlier I was general freight agent of the Baltimore and Ohio. Prior to that time general freight agent of the Central Ohio Company, at Columbus, and the Ohio and Mississippi Company, at St. Louis.

Mr. KERNAN. And this service that you have mentioned covered about how many years in the aggregate?

Mr. BLANCHARD. About thirty years.

Mr. KERNAN. Now, when the Joint Traffic Association first began business, went into operation, it found in existence in the rate sheets these differentials which we have talked about?

Mr. BLANCHARD. Yes.

Mr. KERNAN. And it did nothing at that time except to accept the rate sheets as they were with these differentials in them?

Mr. BLANCHARD. That is all in that respect.

Mr. KERNAN. And it has not since that time sought in any way to change the difference, but simply to enforce them as it found them?

Mr. BLANCHARD. We have not acted to change them, but have had them under advisement and consideration.

Mr. KERNAN. Now you may just briefly give us an idea of how the Joint Traffic Association carries on its operations under the agreement which is on file with the commission; what its agencies are for carrying out what that agreement provides shall be done under the agreement.

Mr. BLANCHARD. The Joint Traffic Association, as its contract shows, required that the railway companies which were parties to it should file with it the tariffs they had in effect the 1st of January, 1896, which came under the jurisdiction of the association, which the boards of directors of the various companies comprising the association approved, and which had been published and filed according to law as to interstate traffic. This was in order to establish starting points for the maintenance of the rates thus published. Some of them have since been from time to time reconsidered when any changes in them have been desired by the carriers or the public. Briefly, that is the foundation and procedure.

Mr. KERNAN. The object of the association mainly is to enforce the rates they have in operation, and as modified from time to time, in so far as they may do so lawfully?

Mr. BLANCHARD. The authority of the managers, as shown by the contract filed with the commission, is only recommendatory to the constituent companies. The boards of directors of those companies reserved all their charter and other rights and powers. When the managers recommend any rate or fare a circular embodying that action is issued by me as an officer of the managers, as provided in that contract. The legal changes in rates or fares are then set forth afterward in the tariffs issued by the companies which decide to conform to such recommendations.

Mr. KERNAN. And the object is to procure the maintenance of the rates?

Mr. BLANCHARD. The purposes of the association were and are to maintain the rates that have been thus legally made, changed, and filed, to make common and uniform rules and classifications relating to such rates and fares in order to secure uniformity in the methods of conducting the competitive business, and, as our con-

tract recites, not idly but sincerely, to cooperate with the interstate commerce act and with those who administer it.

Mr. KERNAN. To do what they could within the law to maintain rates?

Mr. BLANCHARD. Yes.

Mr. KERNAN. And from time to time to meet the changed conditions by recommending such changes as they might think fit?

Mr. BLANCHARD. Quite so; under the same rules of uniformity, equality, and legality.

Mr. KERNAN. Now, with reference to the differentials, you say they have taken no action as to changing the differentials?

Mr. BLANCHARD. None as to actual changes.

Mr. KERNAN. Now, prior to January 1, 1896, is it true that the full extent and observance of the differentials, as a rule, had been that they were printed in the rates scheduled and in a desultory way sometimes observed and sometimes not?

Mr. BLANCHARD. It was my belief, judged from my experience, that the schedules of rates published were not maintained in all instances before 1896.

Mr. KERNAN. So that, as a general proposition, it may be stated, may it not, that prior to January 1, 1896, the differentials had not been sufficiently enforced for long enough periods to enable us to test their effect upon the movement of traffic from interior points to the different Atlantic ports?

Mr. BLANCHARD. I believe that is a correct inference from the rate situations then existing. I believe that such irregularities in rates affected the value of the comparison of the results of the 3 and 2 cents below New York for various periods and at different points of shipment and destination.

Mr. KERNAN. And that arose from the irregularities which in one way or another permitted the differentials to be violated?

Mr. BLANCHARD. It arose from so many causes that it would be difficult to generalize.

Mr. KERNAN. Well, irregularities in one way. I will not say irregularities, from the fact that in one way or another, either through remission of elevator charges or through some means, the differentials had not been maintained.

Mr. BLANCHARD. I think that is substantially a correct inference, but I have no positive knowledge. The differentials were not always observed and the irregularities were the products of concessions alleged to exist in various forms, rates, weights, elevator charges, switching, lighterage, manipulation of the proportions of the roads west of those composing the Central Traffic Association, etc., as well as direct concessions. For example, if a company west of the Mississippi River saw fit to carry through St. Louis instead of via Chicago it might make some concessions, presumably in its own interest, to do so. I do not, therefore, mean that such irregularities were always attributable to our lines.

Mr KERNAN. Now, after the 1st of January, 1896, the association, in such ways as it deemed it might lawfully do, did undertake to eliminate these irregularities and bring about a maintenance of the rates?

Mr. BLANCHARD. In the exhaustive comparisons made of some 86,000 freight tariffs filed under our contract, various inharmonious rates, rules, and regulations appeared. The legal rates were, therefore, sought to be unified as well as the rules, regulations, and conditions, classifications, quantities constituting minimum car loads, etc., which had grown irregular with different railways, as for example, different in Canada from the rates and classifications in the United States in some instances. I instance cartages in Canada and Michigan. All these disparities were sought to be corrected to uniform methods through this association on its traffic. We, therefore, took up the important questions which constituted essential elements of total uniform charges—such as the mileage of private cars from which it was possible that their owners might make allowances to their patrons apart from the railroads. Elevator charges, lighterage charges, delivery charges at Chicago and elsewhere, switching charges, cartage, and other items were considered. These engaged the attention of the association with a view to reviewing the leading elements which properly enter into making rates and charges alike by all like routes between the same points. For example, in connection with elevator charges at seaboard points, those charges were equivalent to slightly more than 2 cents per 100 pounds, estimated on wheat at 1½ cents per bushel. Such charge was more than the differential rate to Philadelphia below New York, and it was as important to maintain those terminal charges or the changes in them as the differential rate itself, and slightly more so.

The Joint Traffic Association reviewed those essential elements of charge and entered into correspondence with the roads having ocean termini, from Montreal to Norfolk, with a view to securing uniformity of terminal as well as transportation charges in accordance with the spirit of the law, the action of the various boards of trade, and our articles of organization, especially as the seaboard terminal charges had been authorized in some instances by trade exchanges, in other instances by

private corporations apart from the carriers, and in other cases by elevators built by the railroads and leased to persons or firms. Our association does not determine or change those charges. These collateral conditions were complicated by some connecting steamship contracts, as, for example, the privileges granted by some elevators to ocean lines different from those granted by others at the same or other ports. Our board has sought strenuously and carefully to equalize such considerations before they could determine the actual effect of the port differentials above or below the standard or New York rates east bound and westward.

Mr. KERNAN. And the object of this action on the part of the board was the maintenance of the scheduled rates as they were filed with you by the different roads, including these differentials, and in order to finally reach a position where a clear test could be made, under fair conditions, at all points of origin and at the ports, of the effect of the differentials?

Mr. BLANCHARD. I can repeat your question as my answer, and as a substantial and leading purpose of the association.

Mr. KERNAN. Now, during 1896, is it true that as the result of the recommendations of the board in the direction that you have suggested, that there came about a more uniform enforcement or maintenance of the rates, as per schedules that had existed prior to that time?

Mr. BLANCHARD. It is my belief that the Joint Traffic Association has by its efforts, and the good faith of the companies which compose it, more nearly secured the maintenance of uniform through rates than has been secured by any other means at any recent time, unless it may be the first eight to fifteen months after the passage of the interstate commerce law.

Mr. KERNAN. And, may we not assume therefore that as the result of that, that the year 1896 is on the whole the fairest test of the differentials that we have since 1882—so far, I mean, as their maintenance through the action you have suggested is concerned?

Mr. BLANCHARD. I think the average maintenance of rates to the various ports (on the traffic which I understand to be the subject of this inquiry) was more nearly accomplished during the calendar year 1896 than in any other year—I would not say since 1882—but say after the first year following the passage of the interstate act.

Mr. KERNAN. So that, with the exception of the year you have mentioned, we may fairly look at the statistical returns of the movement of traffic in 1896 for the purpose of determining the effect of the differentials better than to any year prior to 1896 that you can mention?

Mr. BLANCHARD. So far as the railroads constituting our association are concerned I answer yes, judged by their acts and by their assurances. Please understand that the Norfolk and Western and other lines south of that line are not members of our association, and I do not intend to say that their rates or those of other nonmembers in or exterior to our association averaged better in 1896 than in other years. I have no real knowledge of their condition, but am speaking of our lines.

Mr. KERNAN. The papers yesterday stated that the Norfolk and Western has come down now.

Mr. BLANCHARD. The Norfolk and Western has wisely agreed to cooperate with us as to certain west-bound rates—no eastward. The matter you have in hand has not been touched upon except in the most general terms.

Mr. KERNAN. Now, has the action of the association, in its recommendatory capacity, as you have suggested, extended in any degree to equalizing the elevator charges at New York as made by the railroad elevators, the floating elevators, and the Brooklyn Warehouse Company?

Mr. BLANCHARD. As to the Brooklyn Warehouse Company, I have no knowledge.

Mr. KERNAN. As to the floating elevators?

Mr. BLANCHARD. The floating elevators and stationary elevators at the seaboard termini of all the lines, members of our association, and their eastward connections, agreed to observe substantially uniform schedules according to their prior published tariffs of charges and storage periods, notifying us of any changes therein.

Mr. KERNAN. That was a new condition, substantially, in 1896, to wit, that the railroad elevators, that is the floating elevator combination in the harbor here, was induced to unite with your efforts in maintaining a uniform cent and a quarter charge for elevation?

Mr. BLANCHARD. I understood they would so cooperate.

Mr. KERNAN. And that, of course, has resulted in eliminating such diminution of charge as prior to that time the floating-elevator combination might have been in the habit of making?

Mr. BLANCHARD. I do not know anything about their concessions prior to that assurance, but after that time they agreed, as stated, at all points of export.

Mr. KERNAN. But, if prior to that time they had been in the habit of charging less in whole or in specific instances, that was eliminated by this action you mention?

Mr. BLANCHARD. So I understand.

Mr. KERNAN. And the object of that was whether there should be maintained at each port for the elevation of grain, whether through railroad elevators or through floating elevators, a uniform charge of 1¼ cents per bushel?

Mr. BLANCHARD. I think it was a uniform charge of 1¼ cents on most grains, but may have been different on oats, and the storage periods were not in all cases alike.

Mr. KERNAN. And that would also tend, as far as it was accomplished, to maintain these differentials in their integrity?

Mr. BLANCHARD. When I refer to better maintenance of legal rates in themselves, I include all the elements that enter into and complete uniform charges. As long ago as the agreement of April 5, 1877, between the trunk lines to and at New York, Philadelphia, and Baltimore, it was "agreed that the cost to the shipper of delivering grain at each port from the terminus of each of the roads to the vessel in which it is exported, as well as the number of days free storage allowed thereon, shall be the same." It was then, as now, regarded as an important rate factor.

Mr. KERNAN. How long have you been familiar with the differentials at Buffalo, Erie, and Fairport on grain to New York, Philadelphia, and Baltimore?

Mr. BLANCHARD. During the years I was in Chicago I had no direct familiarity with them, as that traffic did not come under our knowledge or supervision. Since the organization of the Joint Traffic Association it only passes under its general review. That subject continues under the immediate supervision of the Trunk Line Association, which makes its recommendations to our association.

Mr. KERNAN. Then those lake differentials have been the subject of agreement between the trunk lines interested at the ports of Erie, Buffalo, and Fairport?

Mr. BLANCHARD. By the lake differentials I understand you to mean the differentials east of Buffalo, Erie, etc.

Mr. KERNAN. From the three ports.

Mr. BLANCHARD. Yes; they have been the subject of agreement between the interested lines.

Mr. KERNAN. We find those deferentials, Mr. Blanchard, to be a cent and a half a hundred on grain in favor of Philadelphia as against New York, and a cent and a half on grain in favor of Baltimore.

Mr. BLANCHARD. Yes, I think they are.

Mr. KERNAN. We find that as between Philadelphia and Baltimore, that instead of maintaining the Chicago differentials, giving Baltimore a cent the advantage of Philadelphia, that the ex-lake rate seems to be based upon the idea that there should be no difference between Philadelphia ond Baltimore. Can you tell me why that is?

Mr. BLANCHARD. I can not state all the reasons which actuate the Trunk Line Association in their recommendations. The general principle is, taking Erie as an example, when traffic goes via Erie to Philadelphia, all rail, the differentials from Chicago to Philadelphia and Baltimore were the same as via the more direct rail lines. When the like grain originated at the same Western points and reached Erie or Buffalo by lake, it has enjoyed the same differential rates therefrom as if the property went through all rail. That was the general basis upon which the interests met and considered the ex-lake rates. When the Baltimore companies, for example, met the various lines in such conferences they yielded that claim to the extent that the rates to Baltimore might be put up to the same rates as to Philadelphia from those lake points.

Mr. KERNAN. Is it not true that that differential can not be based upon distance, inasmuch as there is no difference in distance practically?

Mr. BLANCHARD. I do not understand your question.

Mr. KERNAN. Is it not true that the differentials are not based on distance? Is there any authority on the distance principle for the basing of differentials?

Mr. BLANCHARD. The distance principle is but one of numerous important factors in the whole question of differentials. They are not based upon various distances, altogether. Distance is, of course, an important element of rates, but does not decide them, because lines of different lengths must carry at equal rates.

Mr. KERNAN. Can it be based upon differences of cost?

Mr. BLANCHARD. In my judgment, no; although cost is another important factor in rates. I do not think any expert can compute the cost of transportation of any particular large traffic, like grain, between any given points, or the differences of cost via different routes. The Pennsylvania Railroad, for illustration, may carry 80 per cent of all its tonnage in mineral, stone, lumber, and coarse articles, mainly loaded by forwarders and unloaded by consignees, often on sidings they provide. In arriving at its average carrying cost, that major traffic is, of course, included, and thereby reduces the general average of its total ton-mile cost. All railways report averages, therefore some costs must be greater than others. When, therefore, you take the Pennsylvania Railroad Company's general average and apply it to its west-bound dry goods or east-bound grain movement, I do not think anybody entitled to your credence will tell you that such average is actually applicable to all classes of its business both ways. Its New York division and terminals may cost 50 per cent more

to operate than an equal number of miles elsewhere on its routes and through other terminals.

On the New York Central the conditions may be reversed if only 20 per cent of its traffic is in minerals, etc., and if its cost of movement is thereby increased. Its New York terminal cost is, for example, included in its average, but no such terminal expenses are incurred by it on the large tonnage it carries to and from Boston. It is therefore impossible to tell by any average of any one railroad to different points or by the average of them all what it costs one or all to transport any particular proportion of its own traffic or all the business. Their local traffic and conditions also differ greatly.

Mr. KERNAN. Can you tell me any fairer way to test these differentials as to cost than to take the average cost per ton per mile of the Pennsylvania, say of 4 mills per ton per mile in 1896, inasmuch as it has lines to these three ports of Baltimore, Philadelphia, and New York? That may not be a correct way, but can you tell me any better way by which we can test the differentials by the cost question that is obtainable?

Mr. BLANCHARD. If an assumed cost is to be used to state a basis of fixing different rates to the various ports, I should say, for the reasons I have given and others, that instead of taking the Pennsylvania Company alone it would be fairer to consider all the lines leading to the seaboard and to begin at the Western starting points.

Mr. KERNAN. And that cost averaged?

Mr. BLANCHARD. Yes; and average that cost. Even then the different conditions I have suggested would make the average misleading. Some companies or routes might be above and others below such average; yet they all carry freights and must do so at substantially uniform rates between the same points.

Mr. KERNAN. Have you attempted, in the traffic association, to do that?

Mr. BLANCHARD. We have kept no such statistics. They would be largely conjectural, and therefore of small value.

Mr. KERNAN. You repudiate both the distance and cost questions as being practical ones to test this question?

Mr. BLANCHARD. I think they are, at best, only approximations.

Mr. KERNAN. Is it not true that the object of the differentials is to obtain an equitable distribution of the traffic to the six Atlantic ports, so as to give to each port that traffic which, under normal conditions, it would obtain? So as to, in other words, recognize the advantages at each port, and to allow each port to get the share which its natural advantages entitle it to?

Mr. BLANCHARD. Generally, yes; but may I explain. When I was general freight agent of the Baltimore and Ohio Company the differentials were never distinctly agreed to, but as I remember them the grain rates from the Southwest were 10 cents per 100 pounds less to Baltimore, and in some cases to Philadelphia, than to New York, and from the Northwest 5 cents less. A trial was also made in 1876 of rates, Chicago to Baltimore 13 per cent less than to New York, and 10 per cent less to Philadelphia, and from Cincinnati to Baltimore 24 per cent less than to New York, etc. That plan promptly resulted in manifest irregularities between localities and was speedily abandoned. Mr. Vanderbilt and the New York lines took this question up with a view to equalizing those differences, and the petitions here to-day are substantial duplicates of those made in 1879 and earlier. The differential rates were contested and the subject was considered by all companies, and the differentials were reduced voluntarily by the lines to Baltimore and Philadelphia.

Mr. KERNAN. That is what they ought to do now.

Mr. BLANCHARD. If you can persuade them to do that the Joint Traffic Association will be relieved of much trouble. I think the differentials ought to take into consideration fairly all the elements at all points. The question is an important one to all interests which are rival in the opening and development of the older as well as the newer ports. The twenty years which have elapsed since the agreement of 1877 and the fifteen years since the Cooley award are long commercial lives for such great questions, and if the conditions differ from the fair grounds then considered they should be now as fairly reviewed by the same parties. Taking Chicago on the west and Liverpool on the east as examples merely, I believe it is the desire of the traffic managers of the lines and the managers of the Joint Traffic Association to establish such conditions that the rates to various points of export, plus uniform charges attaching at the ports of export, and considering all elements involved, shall constitute deliveries substantially at common rates, Chicago to Liverpool.

This result must, of course, be averaged from all points to all ports and foreign destinations. Consideration must be given to all elements, and consideration affecting or determining rates, such as the character of vessels, frequency of sailings, insurance, berthing facilities, ocean charges, speed, etc. That ought to be the general purpose, and I believe it is with all reasonable interests. In that view of the case I have had no reason to doubt that inasmuch as the changes of differential rates have heretofore been brought about without legislative assistance, that with the

advice and counsel of various boards of trade, and through conferences, concessions, agreements, and consideration among the railroads which compete, that when our association had data enough to show that rival rates were maintained the subject should then be taken up by them and in the same spirit as before. For my own part I would welcome such a discussion, believing such consideration and solution will be of as much value to all interests as were the previous adjustments. Any basis of differentials must, however, be in some measure arbitrary and hypothetical, because ocean rates from various points to the Atlantic ports via various routes and to the same as well as different foreign destinations will frequently differ under different circumstances, such as the tonnage available, quantities and proximities of crops to the export ports, seasons, port charges, etc. By reason of these shifting conditions some general or average basis must be arrived at. It is a complex question and difficult of solution.

Mr. KERNAN. I would like, right in line with that idea, to ask you whether, first, have you looked through the statements and tables and one thing and another which we have prepared?

Mr. BLANCHARD. I have not had time since you sent me a copy of your plea and its accompanying statements.

Mr. KERNAN. Could you suggest any line of investigation or of statistics in addition to those we have prepared which would throw light upon the question and enable us to reach a fair determination?

Mr. BLANCHARD. I would like to answer that question at some length. The statistics kept by Mr. Fink were elaborate. It has been commented on here, for example, that the rate to Boston for the longer distance is made the same as to New York. For that criticism to have weight the sources of the traffic ought to be known, and were shown in his tables. For example, wheat grown in Michigan may go to Boston upon a less distance than to Baltimore, while corn from southern Illinois may reverse the mileage advantage. Unless, therefore, we know the sources of the tonnage and its destinations and then reduce it to ton-miles traversed over each route all else is more or less conjectural.

Before the Joint Traffic Association was organized many former statistics were dropped, and we have never renewed them—indeed, we have discontinued some of them. For instance, new lines and elements have come in at St. Louis since Mr. Fink's statements to which you attach importance. There are lines open to the lakes and south of ours which were not then in existence, and are not now in our association. They do not report their traffic, and we have no means of knowing how much their tonnage is, where it originates, or where it is destined. We have no means, for further example, of knowing as to our own traffic that which really originates in Illinois, because grain from Kansas and Nebraska comes with charges prepaid or made local to the Mississippi River, and may appear thence as Illinois traffic. Without going into the refinements of these questions, these are sample difficulties in giving you the sources of business, ultimate destinations, or average lengths of haul. A similar difficulty met the statistician of the United States. I asked him if he could tell me how much of the grain which came to New York by canal was for home consumption or domestic reshipment and how much for export, and he stated he could not. We also must generalize in the manner I have cited, in taking Buffalo as a starting point and making the rates thence to some one destination the unit and adapting others thereto. It will give me pleasure, with the approval of our board, to go through your tables, to assist this investigation, and to make suggestions.

Mr. KERNAN. That is what I wanted to ask you to do. Mr. Fink made a report on this adjustment of transportation to the seaboard in 1882. There are certain tables in that report based upon the traffic of 1880, and especially at the close of the report he gives us a table showing the origin of the traffic in the West just as you suggested; in other words, he said just as you do—in order to determine the question with justice to all, one of the elements to be known is the origin of the Western traffic.

Mr. BLANCHARD. Yes, clearly.

Mr. KERNAN. If we wanted to find out whether Duluth traffic—wanted to find out the tonnage of the Duluth traffic, and then wanted to find whether New York is getting that traffic or whether it is deemed diverted, for instance, to a point like Baltimore, we might find out in that way fairly whether Baltimore has invaded our parish and taken from us traffic which we ought to have. Now, would it be possible to substitute for the table of that nature which you have there one showing the conditions in 1896?

Mr. BLANCHARD. Many present conditions differ from those which prevailed then. For example, the grain that comes to Buffalo now largely changes hands there. Originally it came through on through rates. I do not know that we have any means, as to the large business which arrives at Buffalo by lake, of telling in what area it originates, because the lake carriers act independently in this respect. They are not in our organization. It would, therefore, be more difficult than it was in

Mr. Fink's time, when so large a part of the lake business was through business at through rates. At St. Louis new lines also divert a considerable business south of the Ohio River, and do not report fully. I will be glad to take Mr. Fink's statement and examine it and assist you as I can.

Mr. KERNAN. The extent, it seems to me, to which it would need to go would be to take the traffic delivered to the six Atlantic ports and then ascertain the origin of that traffic—the real origin.

Mr. BLANCHARD. Has not the produce exchange the sources of the traffic which comes from Buffalo ex-lake? Where the charges are paid up to Buffalo we must treat such grain as if it grew in the fields near Buffalo—that is, locally. We do not know where it came from and can not ascertain, nor do we care to know.

Mr. KERNAN. I was speaking of the differentials from Chicago. If we could get the origin of that traffic, that is what we want. The ex-lake traffic is not material. The origin of the ex-lake traffic is Buffalo, Erie, and Fairport. The question we want to get at is whether or not, under the operation of the differentials, that traffic to which we are entitled under normal conditions—that is, a certain share—is not being diverted by the differentials to the southern ports. Can you give the amount of all that traffic—of the percentage going to each of the ports?

Mr. BLANCHARD. From each general source of origin?

Mr. KERNAN. From Buffalo, Erie, and Fairport as ports of origin.

Mr. BLANCHARD. I think that is shown in our statements.

Mr. BLACKMAR. I think Buffalo, Erie, and Fairport can be treated as one point of origin.

Mr. BLANCHARD. The same reason holds at Chicago. We do not know whether grain sent from elevators there came from Winnipeg or San Antonio.

Mr. KERNAN. Will your statistics show the distribution of the traffic?

Mr. BLANCHARD. From Chicago eastward, generally, but not the sources of origin.

Mr. KERNAN. Will the statistics show it at Buffalo?

Mr. BLANCHARD. At Buffalo, I think so; that is, the destinations by States or districts.

Mr. KERNAN. Can you show the distribution of the traffic at Chicago and Buffalo, Erie and Fairport? Can you give us that?

Mr. BLANCHARD. I think so, but will look into it.

Mr. KERNAN. Now, taking flour at Minneapolis, the distribution of that could be given, could it not?

Mr. BLANCHARD. That would have to be supplied by the roads west of Chicago, because some of that traffic passes over the Soo and Canadian Pacific and Ogdensburg routes and does not come into our statements. You can probably obtain that information in the West.

Mr. KERNAN. Is not the same thing true regarding Chicago as a point of origin? Would it not be practicable to show the distribution of traffic as to Chicago as to origin to those six ports?

Mr. BLANCHARD. That would be very difficult.

Mr. KERNAN. If you would give us that we would be very glad to have it. How would it be as to Duluth as the point of origin?

Mr. BLANCHARD. We have nothing to do with Duluth, except as it may be shown in the Buffalo, Erie, and Fairport statements. Even there it all comes into one bulk and would not show Duluth separately.

Mr. KERNAN. We have taken the position on this statement that the canal, as an element to be considered on this question, has been very much eliminated since 1882. That is due to the fact that the percentage it carries has become so small that these differential rates or railroad rates must be considered now substantially with railroad conditions, and are not to any great extent influenced by the canal conditions. Now, what do you say as to that?

Mr. BLANCHARD. I must dissent from that view. The business by canal last year, as I recollect it, was approximately 17 per cent of the total receipts at New York, and this came in a short period of about seven months. It was a much larger percentage for the period the canal was open.

Mr. KERNAN. Six per cent of the total of all these ports?

Mr. BLANCHARD. Six per cent of the total of the reporting Atlantic ports, but 17 per cent of the total arrivals at New York for all of 1886. Even one-half that proportion, or less, might, and probably would, determine the rail rates from Buffalo to New York, and incidentally from all lake ports to all seaboard cities. Moreover, the canal proposes this year to compete for the carriage of flour.

Mr. KERNAN. Now, when you assume that the canal is a competitor, not only of grain and corn, and to a limited extent of such gross articles as lumber and to some extent coal, does it not follow that at least as to all rates except those as to flour and grain that the canal has ceased to be a factor to be considered in determining this differential question?

Mr. BLANCHARD. With the exception of coarse freights to which you allude, with

some iron ore and other things—stone, fertilizers, and coal—added, the canal is not the strong factor it was in 1882.

Mr. KERNAN. In other words, at high rates it has been demonstrated, has it not, that the rail carriers to New York and Philadelphia and Baltimore can, as against the canal, take substantially all the traffic, both east bound and west bound, except those articles which you have mentioned?

Mr. BLANCHARD. That depends upon the relative differences in rates.

Mr. KERNAN. I say at rates slightly higher than canal rates. Of course there is a limit beyond which you can not raise the rates without invoking canal competition.

Mr. BLANCHARD. Yes.

Mr. KERNAN. That is all, I think.

Mr. LOOMIS. Mr. Blanchard, I am told that the existing rate on wheat and oats from Chicago to New York is 20 cents per hundred. Is that right?

Mr. BLANCHARD. Yes, sir.

Mr. LOOMIS. And that the existing rate on the same commodities, Chicago to Newport News, is 17 cents per hundred. Is that right?

Mr. BLANCHARD Yes; and also to Baltimore.

Mr. LOOMIS. I am told that the rate from Chicago to Newport News is made by the publishing and filing with the Interstate Commerce Commission, and at other places as required by law, of a tariff by the company called the Big Four, and the acceptance of that tariff by the Chesapeake and Ohio Railroad Company, reaching to Newport News. Is that right?

Mr. BLANCHARD. Yes; the Cleveland, Cincinnati, Chicago and St. Louis Railroad, which is called the Big Four.

Mr. LOOMIS. And the Chesapeake and Ohio?

Mr. BLANCHARD. Yes, sir; as a connecting line.

Mr. LOOMIS. The first-named company issues a tariff showing this?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. And the second company accepts it?

Mr. BLANCHARD. Yes; its concurrence is shown in the tariff.

Mr. LOOMIS. Now, that rate continues until these two companies change it. Is not that so?

Mr. BLANCHARD. Their and our understanding is that they will issue the same differentials to Newport News that have been heretofore granted under this differential adjustment to Baltimore.

Mr. LOOMIS. These two companies could diminish that rate if they saw fit, could they not?

Mr. BLANCHARD. Both the Chesapeake and Ohio and the Big Four are members of our organization and could diminish it against the recommendation of the managers, on notice of the boards of directors of these companies or of the first company.

Mr. LOOMIS. Well, if the boards of directors of the two companies saw fit to diminish the rate they could do it, could they not?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. And there is nothing in the Joint Traffic Association to prevent their doing it?

Mr. BLANCHARD. Nothing.

Mr. LOOMIS. And suppose it might be assumed that if the rate were diminished to say 15 cents per hundred and there was an inducement in it to the two companies named, they might be expected to do it. Is not that so?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. And those two companies could increase this rate from 17 cents to 20 cents, the New York rate, could not they?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. So far as the physical fact is concerned there is no legal obstacle to prevent them. All they would have to do would be to make the new tariff and publish it and file it where by law it is required to be filed, accepting the 20-cent rate. Is not that so?

Mr. BLANCHARD. That is true.

Mr. LOOMIS. There is nothing in the Joint Traffic Association agreement or the administration of it to prevent their doing that?

Mr. BLANCHARD. Not a line or word, if notified as therein agreed.

Mr. LOOMIS. The same thing is true to all these other petitioners?

Mr. BLANCHARD. Equally true, naturally, to all ports parties to the agreement.

Mr. LOOMIS. The line from Chicago to Boston is composed in part of the Boston and Albany and the New York Central, and then the New York Central's western connections?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. These companies have not any control of the rates from Chicago to Newport News, or to Philadelphia, or to Baltimore, have they?

Mr. BLANCHARD. None whatever.

Mr. LOOMIS. Now, the board of managers that considered this subject—that board consists of ten members?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. Representatives of the different companies members of the association?

Mr. BLANCHAND. Representatives of the ten systems, as they are called.

Mr. LOOMIS. Ten systems, embracing several companies in each system?

Mr. BLANCHARD. Yes; usually.

Mr. LOOMIS. And they have considered this very subject, I understood you to say?

Mr. BLANCHARD. On two or more occasions they have had the subject up and given it preliminary discussion. They have had one, or possibly two, interviews with steamship companies and with the Produce Exchange committee.

Mr. LOOMIS. And this board of managers has power to make recommendations?

Mr. BLANCHARD. Only recommendations.

Mr. LOOMIS. On the subject?

Mr. BLANCHARD. Yes.

Mr. LOOMIS. Now, when you said it was one of the principal objects of the association to maintain rates, did you mean by that to prevent secret reduction of rates, cutting by rebates, etc., is that what you meant?

Mr. BLANCHARD. After a tariff has been published by the companies and filed according to law in form and previous public notice, it is the purpose of our association to thereafter prevent any undue or irregular methods which deplete that tariff secretly or preferentially.

Mr. LOOMIS. You did not, then, mean that its object was to maintain any particular rate for any particular period, whether high or low?

Mr. BLANCHARD. Not at all; we make no rates, but we recommend many. We endeavor to maintain those that are then adopted by the railroad companies, in the exercise of their power and not ours.

Mr. LOOMIS. According to the published tariff open to everybody?

Mr. BLANCHARD. The contract so states.

Mr. LOOMIS. And not to make rates which would result in an undue advantage and preference to one locality or to one individual, is that it?

Mr. BLANCHARD. That is the leading purpose of the association.

Mr. LOOMIS. That is all, sir.

Mr. FISHER. If your honors please, I would like, inasmuch as Mr. Blanchard has been requested by the petitioner's counsel to furnish some further statements, and of course these must be furnished on the part of my colleague, to reserve the right of asking any questions until after that time, especially, if your honors please, as after the petitioner has completed his examination we propose to ask the commission for an adjournment. Your honors will see, of course, the propriety and the necessity really for an adjournment. Probably the suggestion has occurred to the minds of the commissioners without any suggestion on my part.

Commissioner KNAPP. Will you say what there is, what the further information is, which Mr. Blanchard is expected to furnish, and in connection with that the time within which he can conveniently do it?

Mr. KERNAN. I understand Mr. Blanchard to say, regarding the distribution of traffic through these ports originating at Buffalo and Erie and Fairport, and also as to Chicago traffic, too, but that he could not go further than that; is not that so—could not go to Duluth—you could not do that?

Mr. BLANCHARD. No, sir. What six ports have you reference to?

Mr. KERNAN. New York, Boston, Philadelphia, Baltimore, Newport News and Norfolk.

Mr. BLANCHARD. I can not give you Norfolk; that is the reason I asked you what six ports you meant.

Mr. KERNAN. All right, the five ports, then.

Mr. BLANCHARD. Yes.

Mr. FISHER. What year did you ask for, 1896?

Mr. KERNAN. Why, the year 1896; yes, sir.

Mr. SHERMAN HOAR. I would like to have you include some ports north of Boston in that.

Mr. BLANCHARD. I think we can give Montreal and Portland.

Mr. BLACKMAR. Can you give St. Johns?

Mr. BLANCHARD. I can not state whether St. Johns is shown separately or not, or in the statement with Montreal.

Mr. BLACKMAR. But if you can?

Mr. BLANCHARD. Yes, sir; I understand it is the desire of the commission, and I will therefore do so.

Mr. FISHER. You can just as well furnish that information for 1894 and 1895 as 1896?

Mr. BLANCHARD. No; the trunk lines did not keep similar through data in those

years as they did in 1896. I can give you such partial statements as were prepared for 1894 and 1895.

Mr. FISHER. They would be only partial?

Mr. BLANCHARD. I can state them as far as they go. I can not say now how far I could go in them, but in 1896 we can give them, except Canadian Pacific tonnage and tonnage via Ogdensburg.

Mr. KERNAN. Ought it to show separately for domestic consumption and export?

Mr. BLANCHARD. We have no means of stating the actual distinction. You will find in the Chicago statement for the entire year, which I understand the commission desires furnished, that there is no certainty as to these data. Our statements show exports by weeks, but there is this difficulty in that connection. When traffic is consigned for export in some instances a higher rate may be paid, as on corn, if delivered for domestic use. Therefore, the grain which might appear in a Chicago report as export traffic may be used for domestic consumption at various ports and be charged at the domestic rates. The reverse of that is equally true, viz, that some consignments originally domestic may be exported, so that the statement will only indicate the traffic as it left Chicago and then intended to be exported. The same is true, I think, as to Boston—that is, that traffic consigned there locally may be exported or vice versa. I think Mr. Mills, who appeared before you yesterday, will confirm that view. [Mr. Mills concurred.]

Mr. BOND. You can cover in these statements other articles besides grain, can you not?

Mr. BLANCHARD. The statements that are referred to from Chicago show the traffic, not only the grain, but as to flour, cotton, iron ore, etc.

Commissioner KNAPP. Now, we understand it is the desire of the gentlemen to postpone the further examination of Mr. Blanchard until after these statements are furnished. Is that the fact?

Mr. FISHER. Yes, sir.

Commissioner KNAPP. Within what time will it be convenient for you to furnish them?

Mr. BLANCHARD. I will let you know.

Mr. KERNAN. How would it be, Mr. Blanchard, if we should ask you to furnish the same thing from St. Louis and Cincinnati; would we not then have this complete?

Mr. BLANCHARD. We could give you such as we have from St. Louis and Cincinnati, but they are incomplete for the whole year and do not include all lines.

Mr. FISHER. Then it would be, as far as Cincinnati and St. Louis are concerned, entirely incomplete?

Mr. BLANCHARD. I would not state that. Some of these data have differed at different periods. One company might stop its reports in June and the other in September, and we would not be able to tell you anything about them except for the periods when all reported alike.

Mr. FISHER. Then it would be only a partial statement?

Mr. BLANCHARD. Yes; if I furnish that, it would be a partial statement.

Mr. FISHER. Then it would be misleading?

Mr. BLANCHARD. Yes; it would be misleading, although it might be complete for the various months via our lines.

Mr. KERNAN. We have, your honor, a witness or two more in the same line that we have been calling them, regarding grain, flour, etc., and I am not altogether certain but what, after we conclude these, that will pretty much exhaust our testimony and take up the balance of to-day. I think it might perhaps be as well to make the adjournment then, if we are going to take one.

Commissioner KNAPP. I was about to inquire whether you gentlemen would be prepared to continue your examination of Mr. Blanchard immediately after he furnished that information. It occurred to me that perhaps you would want some opportunity to examine these figures.

Mr. FISHER. We would, undoubtedly, if your honor please.

Mr. KERNAN. I have no objection to that. I think after we call two or three witnesses more that will exhaust the day, and perhaps it will accommodate everybody and be convenient to your honor to take the adjournment then instead of proceeding to call other witnesses.

Mr. FISHER. Well, but no.

Mr. LOOMIS. What adjournment are you speaking of—the recess, or what?

Mr. FISHER. We propose at the end of the day, although you have not completed the examination of your witness, to ask for an adjournment of your side of the case.

Mr. KERNAN. I will then have completed all the examination of several of the other witnesses.

Mr. FISHER. You do not propose to announce, then, that you have finished your case?

Mr. KERNAN. We may put your trunk managers on the stand and examine them, but it is hardly worth while to take up that part of the examination at this time of

the week, because we could not finish the examination; but we will substantially have completed all of the class of evidence that we have been going over. We have been looking over our own witnesses, and we think we have nearly finished, and then there will only remain such further investigation as may be made by the examination of such witnesses as Mr. Blanchard and others who are familiar with the railroad question.

Commissioner KNAPP. Do we infer from that that you propose an adjournment at the close of the hearing to-day?

Mr. KERNAN. I think if there is one vacant day this week it had better be taken then.

Commissioner KNAPP. It will then be out of the question to finish the hearing of this case this week.

Mr. KERNAN. I don't think it can be done.

Commissioner KNAPP. There must, then, be an adjournment to some future time.

Mr. KERNAN. Yes, sir.

Mr. FISHER. In respect to the adjournment, if your honors please, your honors can see of course from the nature of these statistics that have been furnished by the other side, and the time that they have been furnished to us here, that we have had no time for the purpose of making any inspection; it has really been impossible to do it; and Mr. Kernan, I think, stated yesterday or the day before, that although he had had some months to prepare for the trial of this petition and for the preparation of these statistics, he had found that time too short even for himself.

Mr. KERNAN. I said a couple of weeks' notice of the hearing in which to do it, which was too short.

Mr. FISHER. Well, it is quite apparent from the testimony that has been produced that the committee of the produce exchange has had this matter in contemplation for a long period of time, and the preparation of these statistics has gone on right along. Now, there ought to be some reasonable corresponding time to enable the respondents on their part to investigate the facts which are set out in the statistics, and to produce such statistics as they want, and it seems to me, if your honors please, that an adjournment of six weeks or two months would be a reasonable adjournment in view of the magnitude of the inspection which it is necessary to make.

Mr. KERNAN. Well, I do not think the investigation ought to be postponed as far as that. It ought to be a matter of two or three weeks, or something of that sort.

Mr. BOND. You remember we live at outports, Mr. Kernan.

Mr. PETTIT. Your honors must recollect that the information contained in these statements is so voluminous that we have got to get people to look this up pretty thoroughly.

Mr. KERNAN. We will get you any information.

Mr. BLACKMAR. They have such admirable lawyers on the other side that they don't need anything to help them in the way of this information. My friend Pettit here is a first-class statistician. I have that from my own experience.

Mr. BLANCHARD. Mr. Kernan, do you want anything more from me?

Mr. KERNAN. I think that is all to-day. I am much obliged to you.

Commissioner KNAPP. Possibly we may assume that you gentlemen will confer and agree upon an adjourned date or time for taking up this case for a further hearing, and in order to facilitate you I will say that the commission is now under engagement to take up some cases through the South, beginning on the 5th of April at Savannah, which will require probably the most of the month of April, so that unless further testimony can be taken in this case next week and the early part of the following week the commission will not be able to assign you a date until after the 1st of May.

Mr. KERNAN. We can be ready to close the case and would be very glad to do it next week, and at the same time I recognize that there is reason in the suggestion which has been made by the other side, so that I have no objection to a reasonable adjournment, say to the first part of May, and in that case with the full understanding that when we meet then we will close it.

Mr. FISHER. Well, we will agree to that.

Mr. KERNAN. I should say that we ought to have an understanding to that effect, and then we should all be here prepared to close it, because we would not want to have the hearing left over to have it during the summer term.

Commissioner KNAPP. With reference to the date of further hearing, I can only say ahead that we will assign a date during the month of April. It is probable that we can take up the case for a further hearing almost any day after the 1st of May, during that month, but we appear now to be obliged to be in Chicago in June, so that about all the time we have at our disposal to visit New York in this case is this coming week, the first part of next week, and the month of May. Of course we can accommodate ourselves for a day or two, one way or the other.

Mr. KERNAN. If agreeable to the commission, why not say the 3d of May, which

is Monday, and then the commission will expect people to devote as much time during the week as would be necessary to close the evidence.

Commissioner KNAPP. It looks to us that it might be safer to name the 10th of May than the 3d.

Mr. KERNAN. Oh, yes, sir; I think we can agree to that.

Commissioner KNAPP. The second Monday, instead of the first?

Mr. KERNAN. Yes, sir; then we will understand it to be the 10th of May.

Mr. FISHER. The 10th of May.

Mr. PETTIT. If your honors please, I think that time will suit us all. Probably as this covers a section of the case, where parties interested would be liable to come from all localities, it seems to some of us that probably Philadelphia would be a more central point than New York to hear the witnesses that we will want to call on behalf of these commercial interests. They will have to come from the south as far Newport News, and as far as Boston. Your honors will have the United States court rooms there, and you will find them very comfortable and convenient, and it would be nearer the center of the case.

Mr. KERNAN. The seat of the difficulty?

Mr. PETTIT. Yes, sir; nearer the seat of the difficulty.

Commissioner KNAPP. I understand, then, that there is to be an adjournment after to-day, but that you will call two or three other witnesses this afternoon?

Mr. KERNAN. Yes, sir; we will fill up the day.

Commissioner KNAPP. You will fill up the day; and now, then, during the recess for luncheon, perhaps you gentlemen can agree as to where the next sessions are to be. If not, we will have to fix a place.

Mr. KERNAN. Perhaps so, and in regard to that I want to say to you that I think this hearing has demonstrated that no more convenient place for everybody can be found than here. All the testimony has shown that all of the large export business that we are talking about is controlled here in New York, and that it is represented by the business houses here. There is nothing else to talk about, substantially.

Commissioner KNAPP. I am only suggesting to you that you take that into consideration with the view of attempting to agree among yourselves. If you can not agree among yourselves, of course we will agree among ourselves. We will let the matter stand until after the recess. I want to ask Mr. Blanchard a question or two. You will kindly remain in session now until some questions can be asked of Mr. Blanchard.

Commissioner CLEMENTS. I understood you to say that the rates were maintained equally as well for a year or fifteen months after the interstate commerce law was passed, as during 1896; am I correct?

Mr. BLANCHARD. Yes; that is my impression.

Mr. CLEMENTS. The same differentials existed then as do now, did they not?

Mr. BLANCHARD. Yes.

Mr. CLEMENTS. You further stated, I believe, that it was your belief and your observation, from facts that have come in your possession, that tariff rates, established tariff rates, had been better maintained in 1896 than any other year except the period you referred to?

Mr. BLANCHARD. Yes; since 1887.

Mr. CLEMENTS. Now, does that statement have reference to tariff rates outside of the Joint Traffic Association?

Mr. BLANCHARD. I have no knowledge of any other roads.

Mr. CLEMENTS. You only apply that statement to your own roads?

Mr. BLANCHARD. Yes; those in our territory and to our business.

Mr. CLEMENTS. Are there some roads that carry to Newport News and Baltimore, and Norfolk and Boston, that are not members of your association?

Mr. BLANCHARD. The business to Norfolk by way of the Chesapeake and Ohio road was first included; the larger Norfolk and Western business is not included. The latter carries considerable traffic from St. Louis and elsewhere, not known to our tonnage statements. My statement was only as to the roads in our association. The road which leads to Newport News is in the association; all the rail lines to Baltimore, all the lines to Philadelphia, New York, and to Boston, and the Canadian Pacific appointed a manager on our board in July, 1896, as to its business between points in the United States, but has not reported its tonnage.

Mr. CLEMENTS. From your observation and knowledge of the facts, do you have the same belief as to the maintenance of rates to the Southern ports by way of the South?

Mr. BLANCHARD. No.

Mr. CLEMENTS. And as to this port?

Mr. BLANCHARD. My observation is that these Southern lines have not maintained the same rates through the Southern ports to New York that we have.

Mr. CLEMENTS. You mean they have not maintained the published rates?

Mr. BLANCHARD. I mean they have not maintained our published rates; that is,

our published or differential traffics. I include, generally, grain rates through Galveston and New Orleans, and to and via Norfolk, and certain new lines, such as the Asheville route.

Mr. CLEMENTS. That leads to Newport News?

Mr. BLANCHARD. No; it does not lead to Newport News, but to New York and elsewhere by steamer connections.

Mr. CLEMENTS. It is your belief, then, from these facts which you observe, that while the differentials exist as stated, the roads carrying directly to New York are maintaining the rates and the others leading to the Southern ports are not?

Mr. BLANCHARD. My observation is to that effect as applied to the observance of our traffics.

Mr. CLEMENTS. To what effect?

Mr. BLANCHARD. That the rates of the Joint Traffic Association were, during 1886, substantially maintained by its lines. My information as to the Southern rates is derived so much from hearsay that I do not like to say anything more than that I have information that freight rates have not been so regular via those outlets to or from our points, although they may have maintained the rates which they filed with your honorable board. As to that I do not know.

Mr. CLEMENTS. Then it would not follow that the change in the business was due to the published differentials or grade differentials, from that statement?

Mr. BLANCHARD. No.

Mr. FISHER. You are speaking of the Gulf port roads, are you; the roads leading to the Gulf ports?

Mr. BLANCHARD. Yes; all ports from the Gulf at Galveston up to Norfolk.

Mr. FISHER. You are speaking of the Southern roads?

Mr. BLANCHARD. Yes.

Mr. BLACKMAR. You do not include the roads to Baltimore and Newport News?

Mr. BLANCHARD. No; I am distinctly speaking of routes and points south of Newport News.

Mr. SHERMAN HOAR. When you said that all the roads to Boston were members of the Joint Traffic Association, that statement should be qualified by omitting the Boston and Albany Railroad, should it not?

Mr. BLANCHARD. I meant to say that the connecting lines west of the Hudson River, members of the association, include their New England business in our association and the tonnage reports. We have also received the cooperation of the New England lines in the association purposes I have recited.

Commissioner CLEMENTS. In speaking of the shipment of grain from the West you mentioned Chicago as a basing point coming through to the Atlantic ports. Is it not true, since the improving of the harbors at Galveston and Newport News and Norfolk, that much of the grain in the territory of Kansas and Nebraska that formerly came this way now takes the nearer and more direct way to these Gulf ports?

Mr. BLANCHARD. Yes; there is a larger proportion of grain going to the Gulf ports now than before those lines had their present improved facilities. Before then it went mainly through Chicago. St. Louis, Peoria, Cairo, etc.; but since the improvements at Galveston and New Orleans, the erection of elevators and the construction of warehouses, etc., there, they have taken considerable additional traffic to those points. I regard them as natural outlets for an important section of the national territory, and that they were entitled to share the competitive traffic tributary to their lines, as are Baltimore, Newport News, Norfolk, or Philadelphia as compared with New York.

Commissioner CLEMENTS. At the same rates traffic will ordinarily move by the shortest routes?

Mr. BLANCHARD. That depends. The shortest mail route may be to the Gulf, but the sea route and the total mileage may be longer. It may be the shortest route or mileage to the Gulf, but thence it may be the longest sea route to Liverpool and Bremen, etc. It does not follow that the traffic always traverses the shortest entire——

Commissioner CLEMENTS. Since the better development of these ports by elevators and shipping facilities—deeper water—in the manner you speak of, does not a great deal of grain come from northern Texas and Nebraska and Kansas there that formerly went to Chicago?

Mr. BLANCHARD. Yes.

Commissioner CLEMENTS. Did it not formerly go from northern Texas to the Atlantic ports?

Mr. BLANCHARD. Yes; some quantities of grain; but northern Texas used to send its supply mainly to the South, through the Memphis and Vicksburg gateways. They did not send much North. Some of it was milled at Kansas City, East St. Louis, etc.; but what was sent to the large consuming districts in the interior and East naturally came through the Chicago or other gateways of our lines, and continues to do so.

Commissioner CLEMENTS. How are the shipping facilities from the Gulf ports, with respect to the frequency of vessels going and obtaining tonnage for shipments from those ports, as compared with New York?

Mr. BLANCHARD. I can not answer. I have never seen the comparative lists of sailings: they are easily accessible, but they are less frequent than from New York and other Atlantic ports.

Commissioner CLEMENTS. Now, have not ocean rates diminished over former years, considerably diminished from both Galveston and New Orleans and diminished from Newport News and Norfolk?

Mr. BLANCHARD. Yes; from all those cities.

Commissioner CLEMENTS. And New York also?

Mr. BLANCHARD. Yes.

Commissioner CLEMENTS. And Boston?

Mr. BLANCHARD. Yes.

Commissioner CLEMENTS. And about in the same proportion?

Mr. BLANCHARD. I can not answer for the farther Southern ports—nothing south of Newport News or Norfolk—but the impression I have derived from current reports furnished by shipping agents is to the effect that the reductions of ocean rates have been greater from points south of New York than from New York and points north of it in recent years, say since the Cooley award of 1882.

Commissioner CLEMENTS. Are there more lines than there were formerly between those ports?

Mr. BLANCHARD. There has been an increase of lines from the Southern ports, and I think the sailings have been more increased from those ports, relatively, than from New York or Boston.

Commander CLEMENTS. Can you tell whether or not the terminal charges—the term here called "port charges"—incident to this harbor in shipping from New York have been increased or diminished since the period you alluded to—1886 and 1887?

Mr. BLANCHARD. I have no knowledge on that subject.

Commissioner CLEMENTS. You have not?

Mr. BLANCHARD. No; it does not come under our knowledge or possession.

Commissioner CLEMENTS. You said, if I understood you correctly (to illustrate), that the Big Four Railroad and the Chesapeake and Ohio could at any time, notwithstanding their membership in the Joint Traffic Association, reduce their rates. You meant to say by that, I suppose, that under the law they can do it if they choose to?

Mr. BLANCHARD. They can do it both under the common and statutory law and under their contract with the Joint Traffic Association.

Commissioner CLEMENTS. Do I understand you to say that they can be members of the agreement, or that association and parties to the agreement, and obey all its rules, and at the same time independently act for themselves without consulting the other members of the association, and reduce their tariff?

Mr. BLANCHARD. Yes; but I wish to draw a distinction between the rates of the association and its rules. By the terms of our contract, the board of managers make recommendations as to rates to the various companies comprising the association, but the clause in the contract to which I refer provides that if any company dissents from such recommendation it can, by action of its board of directors, duly notify the managers of their dissent therefrom, and thereafter publish other rates. Dissent naturally produces lower rates, because they would not dissent in order to make higher rates; but when it comes to the rules applicable to rates, such as classification, etc., charges at seaport points, rates to intermediate points, etc., such rules would remain in force and be applicable to any rates; but the rate-deciding power of the board of directors of each company was reserved by them in the contract.

Commissioner CLEMENTS. Now, suppose these two systems should want to reduce their rates to Norfolk to 15 cents, and being members of your association, and desiring to live up to their agreement in every way, what step would they first take?

Mr. BLANCHARD. They would dissent from the prior rate and give the notice provided in the clause of the contract to which I have referred. The contract provides that the managers shall then consider the steps necessary for the due protection of the other companies and localities.

Commissioner CLEMENTS. What steps are provided for by the other roads?

Mr. BLANCHARD. No steps are provided, except that should the tariff rate be reduced to Newport News by the Chesapeake and Ohio road to 15 cents, there is no reasonable doubt that the rates would be immediately reduced to Boston, New York, Philadelphia, and Montreal to correspond therewith, in order to preserve the agreed geographical relations and the interests of rival lines.

Commissioner CLEMENTS. Is not there some obligation on your part that precedes what notice they would give?

Mr. BLANCHARD. Yes; a moral obligation that they would come to us for the consideration of their reasons. The practice of the association is, that if any company dissents from a rate recommended by the managers, it would ask them to be heard

or be invited by them to state its reasons. If it adhered to its independent intent, its recourse is as provided in the agreement, and I have repeated it.

Commissioner PROUTY. If we take any action on this, of course we want to get at some basis on which that action should be based. Now, what do you say the purpose of these differentials is?

Mr. BLANCHARD. The eastward rate, Chicago to New York, for example, is the same by all like routes. The same principle should, in my judgment, apply as far as practicable from St. Louis to London, but some routes of unequal facility between domestic points have differentials. The purpose of the present and prior port differentials has been to make the rates from Western producing centers to important European centers substantially alike, all conditions having weight, not alone on current through bills of lading as to such traffic, but in the aggregates of the average rail and ocean charges so far as they can be reasonably approximated to fluctuating ocean conditions, the inland conditions being substantially uniform and permanent. These differentials must also have relation to import as well as export tonnage.

Commissioner PROUTY. Having Chicago as one point, representative of the Western points, and Liverpool as another point, representative of the foreign ports, the object of the differential is to make the rate from Chicago to Liverpool through all the ports the same?

Mr. BLANCHARD. The differential can not in all cases be based on Chicago or Liverpool, but must be the average of various starting points and numerous markets abroad, after taking into account all the due factors of rates, charges, and conditions. That being done, the object is as you state it.

Commissioner PROUTY. And if you accomplish that purpose, it is not any part of your purpose to see whether the proper amount of traffic goes one way or the other? All you aim to do is to keep the actual rate, the actual cost of that transportation, the same?

Mr. BLANCHARD. I think the proposal should be, that if the through freight rates are thus substantially equalized, the European buyers, American sellers, and all intermediate commission agents, etc., be left free to choose differential, consider the claims of New York, Boston, Baltimore, Philadelphia, or Norfolk; that has not anything to do with it so long as the rate through each port is the same.

Mr. BLANCHARD. Substantially, I believe that is a correct view.

Commissioner PROUTY. When was this present differential fixed?

Mr. BLANCHARD. The present differentials were agreed to by the lines to New York, Philadelphia, and Baltimore in April, 1877. On this point the memorandum then made was as follows:

"To avoid all future misunderstanding in respect to the geographical advantages or disadvantages of the cities of Baltimore, Philadelphia, and New York, as affected by rail and ocean transportation, and with the view of affecting an equalization of the aggregate cost of rail and ocean transportation between all competitive points in the West, Northwest, and Southwest, and all domestic or foreign ports reached through the above cities," etc.

The differentials then agreed to are those now under discussion, and were affirmed by Judge Cooley and Senators Washburn and Thurman. In their decision, July 20, 1882, they said:

"Differential rates have come into existence under the operation of competitive forces; they bear some relation to relative distance and relative cost of service; they recognize, as we think, the relative advantages of the several seaports, and they are subordinate to the great principle which compels the carriers of property competing between the same points and offering equal facilities to their customers to make the same rates."

Commissioner PROUTY. The testimony before us is that on cargo lots the ocean rates from the five ports are substantially the same. Is that your understanding of the matter?

Mr. BLANCHARD. We are now endeavoring to get accurate information on that point. The reports we have vary in that respect. Of course, the ocean rates are fixed more squarely upon grain, but with reference to other cargoes, such as provisions, tobacco, wool, cotton, etc., they are not, and ocean rates fluctuate weekly. All these questions have to be taken into account in order to establish proper average differentials as to the ports from which these varying ocean conditions prevail. As to the cargo question upon grain, I have stated that my information is to the effect that the reduction in the ocean rates from Southern ports has been more since 1877 and 1882 and since the passage of the interstate law than from the Northern ports, and that they more nearly approximate equality from all ports than they did in 1882 or 1887.

Commissioner PROUTY. The testimony before us tends to show that the cargo rates on grain from the five ports are identically the same, and if that were so and the grain was all carried abroad in cargo lots there ought to be no differentials at either place.

Mr. BLANCHARD. If all the other conditions and circumstances to which I have referred were alike, including harbor charges, terminal charges, foreign destinations, sailings, insurance, character of vessels, banking facilities, and so on, I think you have stated correctly the theory upon which differential inland rates have been and should be constructed to the various ports. The larger quantity of spot tonnage at New York brought coastwise, the lower rates upon grain especially during the season of canal navigation to New York, etc., are factors which must receive due consideration in determining reasonable differentials to points both north and south of New York. It will also challenge your consideration whether the Baltimore and Ohio and Chesapeake and Ohio companies shall charge as much to Baltimore and Newport News as for about 200 miles more to New York via their lines.

Commissioner PROUTY. Now, in point of fact, grain is sometimes carried abroad at berth rates and sometimes at cargo rates. I have here a table which shows that in 1882 there was a certain difference between the berth rates from New York and Philadelphia and Baltimore. That table shows that in 1896 that difference is substantially eliminated; it is about the same now. Now if, in point of fact, there has been a shrinkage in this difference, there ought to be a corresponding shrinkage in the differentials if everything else continues the same.

Mr. BLANCHARD. There ought to be an approximation to equal combined rates. I have endeavored to recite the theory of the application of inland rates and differentials to shipments abroad; that is, in the formation of through or aggregate rates. It matters less what the relative rates are for articles consumed at New York and Baltimore, but it matters greatly as to traffic exported.

Commissioner CLEMENTS. You have said, in answer to a question of Mr. Loomis, I believe, that the purpose of the maintenance of rates as expressed in the joint traffic agreements, and which is the object of your association, has reference to the maintenance of rates established and published under the law.

Mr. BLANCHARD. Yes; that is the amount of it.

Commissioner CLEMENTS. That is the purpose of it?

Mr. BLANCHARD. Yes; that is the purpose.

Commissioner CLEMENTS. Do we understand you by that to mean to say that one purpose of it is not to maintain the rates agreed on by the association, with its machinery for making rates, competitive rates to points on all the lines and that by the maintenance of the rate is meant the maintenance of the rate that the association makes or authorizes or agrees to?

Mr. BLANCHARD. I can perhaps state the purpose of the association more clearly than I have before. At Chicago, for example, there are ten east-bound railroads, all leading to New York, and several, but not all, to the other ports. Some conference as to making and maintaining like rates via all those routes to each destination is essential to commercial equity and fairness at that point and elsewhere, because Chicago affects a large number of other places. There is no difference in the effect on trade between ten rates on ten railroads and ten rates on one railroad so far as geographical or individual advantage or ruin are concerned.

Therefore an essential parity of rates must be determined by conference and agreement before rates are announced, and they must be also uniform in announcement and duration. To apply this illustration we have say three thousand commodity rates reducing class rates between the east and the west both ways. Applications, whether to eliminate any of such commodity rates before thought too low by us or which shippers thought too high, are brought before our board. There being independent associations east and west of Buffalo, Pittsburg, Wheeling, etc., the rates are under our rules referred by us to those respective associations to be laid before their constituent lines and to ask their ballots thereon, and they usually consult their shippers. These ballots are tabulated in our office and laid before our managers as the advice of the railroad companies to them in such respects. In some cases these recommendations are approved, in some they are not. When notices of our concurrence or dissent are issued they are in the forms of recommendations. By the terms of the law and of our contract, after any rate so considered is approved it is further necessary to have published and uniform tariffs, which are always issued by the carriers.

Thereafter the machinery of our association is used, so far as can legally be done, to maintain such carefully considered rates, provided all the constituent companies accept the views of the managers. Such rates are published and filed according to law by the companies affected, and not by us. We file no tariffs, but copies of the tariffs are, under our association agreement, filed in my office presumably at the same time as with this honorable board. The object of our association is thereafter to act as the strong right arm of your organization and to make the same efforts to maintain rates which you do. I think we do more to that end than you do. As to the great mass of these rival rates, of which there are now about 600,000 between 4,000 Western points and 7,000 Eastern destinations, and with all the complications resulting therefrom, we have adopted this general rule and usage.

Further, when the interstate act took effect the eastern-bound first-class freight rate, for example, from Chicago to New York was 75 cents, but west bound it was $1. Pursuant to our understanding of the purposes of that act, we reduced the west-bound freight rates to those east bound, although they applied on different classes of goods, more valuable westward. In other words, the units or pivotal rate points are New York in the East and Chicago in the West, these having been made the standards, with changes in the rates for traffics of exceptional character, such as dressed beef, grain, cotton, wool, live stock, meats, iron, and so on. We consider those articles exceptionally as trade reasons affect them, and rates thereon are from time to time changed, but the class rates are supposed to remain substantially as at the passage of the act and they have never been challenged by the public, unless in isolated cases.

As to applications touching rates and rules between these and other points, hearings have been granted before the Trunk Line Association, the Central Traffic Association, and our own whenever the carrying and commercial interests differed. Although they all seek reduced rates, we encourage such hearings. Then, as to Cincinnati and Indianapolis rates, for illustration, the basis being fixed on Chicago to New York, as stated, other rates are a greater or less percentage of Chicago rates according to varying distances, terminal expenses being also considered. Where the distance is more than from Chicago, rates are increased, as from St. Louis and Peoria. The Boston rates for exports are then made the same as to New York with certain differentials higher for local consumption at Boston. Philadelphia is made 2 cents less on grain, etc., and Baltimore 3 cents, and those differentials above or below New York are carried down through the interior of Illinois and other States, as at Peoria, Vincennes, Cairo, Cincinnati, Indianapolis, etc., thus giving the benefit of Chicago conditions to every interior point.

The Joint Traffic Association has rarely departed from that class rate basis, because it has been the result of the evolution of rates for forty-five years. It has produced reductions of rates on cotton within my experience from $5 per 100 pounds to 35 cents from East St. Louis to Boston; on flour, from $2.50 per barrel to 50 cents, and west bound on dry goods from New York to Chicago from $2.50 to 75 cents. The rate on cheese from Buffalo to New York has been reduced from $1.50 per 100 pounds to 28 cents. There must, however, be some points at which rate reductions must stop, and remain only reasonable, or less than reasonable, and where uniform rates and procedure are absolutely essential to all interests. Railroads must therefore meet and make these rates in the way I have recited or some other way, and were they not so determined and issued, there would be commercial and financial chaos and petitions to resort to our again as much as if custom rates differed. Shippers can not wait until their freight is sent to railway stations to know what the rates are. Admitting our rates to be reasonable, we have regarded it as due to the public under the common law and the law governing your honorable body and ourselves, as well as under our own organization, to do everything in our power to maintain those rates and prevent their unfair, unreasonable, and secret depletion or preferences. I use the word maintain in that sense only.

Commissioner CLEMENTS. Then, I do infer from all you have said that you do not wish to be understood as limiting the term or expression "maintenance of rates" as the purpose of your association, but simply to enforce the maintenance of rates that have been established under the interstate-commerce law?

Mr. BLANCHARD. If I have left any other impression with you I am glad to correct it.

Commissioner CLEMENTS. It includes the making of what your association believes to be right, so far as the rates are concerned, and an adherence to them after being made?

Mr. BLANCHARD. That is true; and there is one feature in the making of our rates requiring a further statement. We have, for example, a committee consisting of twenty-three officers of lines representing the largest steel-rail carriers in our section of the country. Commensurate with the reductions recently made in the price of steel rails, that committee have recommended and we have approved certain reduced rates for the transportation of the rails.

As to other articles of steel and iron manufacture, our classification calls for fourth class for small quantities and fifth class for carloads. Last week our association advised a reduction in that entire classification all over our territory until the end of navigation, amounting to one full class in all directions, with hundreds of thousands of dollars of depletion in our revenues. Having thus agreed upon various reduced rates as the result of such railroad and mercantile conferences and in recognition of the commercial conditions of the country, our association thereafter bends its efforts to the maintenance of such reduced rates as a legal and equitable duty, and as proper rewards for our services.

Commissioner CLEMENTS. What I want to know is whether we are to understand that you, in purpose as expressed of maintaining rates—whether that includes the

holding up of rates to a standard which you want to enforce, as well as the adherence to them after they are made and published.

Mr. BLANCHARD. That includes the revision of rates from time to time; but after their determination, in the manner I have recited, we insist upon their impartial maintenance.

Commissioner CLEMENTS. Do you not exercise any influence, through this association, to prevent any individual line reducing the rate below the points where the other lines would be willing to compete?

Mr. BLANCHARD. Yes; to the extent that we would ask for a conference and go over the matter.

Commissioner CLEMENTS. And the whole machinery is with a view of that, as well as for the purpose of maintaining the rates after they are published?

Mr. BLANCHARD. Yes. For example, our recent reductions on export corn, from 20 cents to 15 cents, was the result of conferences of that character.

Commissioner PROUTY. Do you think these remarkable reductions would have taken place if there had been a joint traffic association all the way through?

Mr. BLANCHARD. I do not think any association has any effect to make undue rates, but only to maintain the rates which commercial and competitive conditions compel.

Commissioner PROUTY. You think this is for the benefit of the merchants, then?

Mr. BLANCHARD. I think so. I never heard of any complaint from any merchant, and as our revenues are four times those of the Government, I think the maintenance of our legal and reasonable rates four times as important as to maintain uniform import and postage tariffs.

Mr. BOND. I would be glad if you would state the rate conditions in Nebraska and Kansas and the Southwestern corn belt during the last season as regards the rates of Gulf ports and Atlantic ports.

Mr. BLANCHARD. Can you be a little more explicit?

Mr. BOND. I mean what were the comparative rates for that district—just the rate?

Mr. BLANCHARD. Generally speaking, and not from any certain knowledge, I understand that practically the pivotal point is that the Illinois Central rate from East St. Louis to New Orleans is largely the basis used from points west thereof to Galveston. That is only hearsay, but from that starting point the rates farther west remain about that basis to the Gulf ports, but they increase more via St. Louis, Peoria, and Chicago, and our lines to eastern points and ports, as the distances lengthen. This makes it an extremely difficult geographical question to consider and adjust.

Commissioner CLEMENTS. What I wanted to get was the comparison between the operation of the Gulf rates in that territory and the Joint Traffic Association rates.

Mr. BLANCHARD. Their rates to the Gulf are much lower than ours to the Atlantic ports. Does that answer your question?

Commissioner CLEMENTS. I wanted to know what they were—the actual rates?

Mr. BLANCHARD. Assuming that the rate from a given point in Kansas to Galveston to-day is, say, 12 cents, and the rate from same point to East St. Louis is 7 cents per hundred, our rate east of East St. Louis would be 23 to New York on wheat, 23 plus 7 is 30 against, say 12 or 15 or more, as the case may be, to the Gulf. From the remoter western points their rates may be thus in some cases one-half as much to Galveston as to New York.

Commissioner KNAPP. If there is nothing further from Mr. Blanchard he will be excused.

We will now take recess until 2 o'clock.

EXHIBIT D.

ARTICLES OF ORGANIZATION OF THE JOINT TRAFFIC ASSOCIATION.

[Adopted November 19, 1895. To take effect January 1, 1896.]

PREAMBLE.

PURPOSES OF THIS AGREEMENT.

To aid in fulfilling the purposes of the interstate commerce act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of

agencies and the introduction of economies in the conduct of the freight and passenger service,

The Allegheny Valley Railway Company,
Baltimore and Ohio Railroad Company,
Baltimore and Ohio Southwestern Railway Company,
Central Railroad Company of New Jersey,
Chesapeake and Ohio Railway Company,
Chicago and Erie Railroad Company,
Chicago and Grand Trunk Railway Company,
Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Delaware, Lakawanna and Western Railroad Company,
Detroit, Grand Haven and Milwaukee Railway Company,
Erie Railroad Company,
Grand Rapids and Indiana Railroad Company,
Grand Trunk Railway Company of Canada,
Lake Shore and Michigan Southern Railway Company,
Lehigh Valley Railroad Company,
Michigan Central Railroad Company,
New York Central and Hudson River Railroad Company,
New York, Chicago and St. Louis Railroad Company,
New York, Ontario and Western Railway Company,
Northern Central Railway Company,
Pennsylvania Company,
Pennsylvania Railroad Company,
Philadelphia and Reading Railroad Company,
Philadelphia, Wilmington and Baltimore Railroad Company,
Pittsburgh and Lake Erie Railroad Company,
Pittsburgh and Western Railway Company,
Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company,
Terre Haute and Indianapolis Railroad Company (Vandalia Line),
Toledo, Peoria and Western Railway Company,
Wabash Railroad Company,
West Shore Railroad Company,

do hereby constitute the Joint Traffic Association (hereinafter called the association) and make this agreement for the purpose of carrying out the objects above named. Other companies may become members of the association as provided in Article Three.

ARTICLE ONE.

BOARDS OF ADMINISTRATION.

SECTION 1. The affairs of the association shall be administered by three boards, with duties as hereinafter specified:

(*a*) A board of control.

(*b*) A board of managers, hereinafter called the managers.

(*c*) A board of arbitration, hereinafter called the arbitrators.

SECTION 2. Wherever the term traffic is used herein it means both freight and passenger traffic.

ARTICLE TWO.

TRAFFIC SUBJECT TO THE ASSOCIATION.

SECTION 1. The association shall have jurisdiction over all competitive traffic (subject to the exceptions noted in section 2 of this article) which passes to, from, or through the western termini of the trunk lines, viz: Toronto, Can.; Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk, and Salamanca, N. Y.; Erie, Pittsburgh, and Allegheny, Pa.; Bellaire, O.; Wheeling, Parkersburg, Charleston, and Kenova, W. Va., and Ashland, Ky.; and such other points as may hereafter be designated by the managers as such termini; also all traffic which may pass through other junctions of the companies parties hereto which is included when passing through any of the termini or junctions above or hereafter specified, and such other traffic as may by common consent of the parties be hereafter included herein.

SECTION 2. The following shall not be included:

(*a*) Coal, coke, iron ore, mill cinder, limestone, and petroleum, crude or refined.

(*b*) Traffic destined to or coming from Florida, Georgia, North and South Carolina, Virginia, and West Virginia south of the south line of the Chesapeake and Ohio Railway.

ARTICLE THREE.

THE BOARD OF CONTROL.

SECTION 1. The presidents of the companies forming the association and of such other companies as may become parties hereto shall constitute the board of control, which shall meet on the written request of any three of its members.

SECTION 2. In case of the absence of any member of the board of control from a meeting the next ranking officer in such company having jurisdiction over traffic will have authority to act in his place and stead.

SECTION 3. Each member of the board of control shall be entitled to one vote, except that no system as designated in article four shall have more than three votes in the aggregate.

It shall require three-fourths of the entire number of authorized votes to adopt any proposition coming before the board of control.

SECTION 4. The board of control shall fix the salaries of any commissioners appointed by the managers.

The salaries of other officers and employees of the association shall be subject to its review and approval.

The board of control shall select the arbitrators and fix their compensation and term of service.

SECTION 5. The board of control shall appoint an auditing committee, who shall examine and report to it upon the accounts of the association.

SECTION 6. The board of control shall prescribe the conditions and rules under which additional railway systems or companies shall become parties hereto and be represented upon the board of managers.

SECTION 7. Only the board of control shall consider appeals from the action of the managers on all questions as to rates or fares, except differentials.

SECTION 8. Pending decisions by the board of control, the decisions and orders of the managers shall prevail.

ARTICLE FOUR.

THE BOARD OF MANAGERS.

SECTION 1. The board of managers shall consist of not less than nine members, of which each of the following nine systems shall designate one:

Baltimore and Ohio system, now comprising the Baltimore and Ohio Railroad line from Philadelphia to Parkersburg and from Philadelphia to Chicago via Wheeling and via Pittsburg and Connellsville; Baltimore and Ohio Southwestern; Cleveland Terminal and Valley, and the Pittsburg and Western Railroad companies, and all their leased, controlled, or operated lines.

Chesapeake and Ohio system, now comprising the Chesapeake and Ohio; Cleveland, Cincinnati, Chicago and St. Louis, and lines composing that system, and the Peoria and Eastern Railroad companies, and all their leased, controlled, or operated lines.

Erie system, now comprising the Erie Railroad Company; the Chicago and Erie Railroad Company, and all their leased, controlled, or operated lines.

Grand Trunk system, now comprising the Grand Trunk Railway Company of Canada and its affiliations west of the St. Clair River, viz., the Chicago and Grand Trunk; Cincinnati, Saginaw and Mackinaw; Detroit, Grand Haven and Milwaukee; Michigan Air Line, and the Toledo, Saginaw and Muskegon railway companies, and all their leased, controlled, or operated lines.

Lackawanna system, now comprising the Delaware, Lackawanna and Western Railroad Company and its leased lines; and the Syracuse, Binghamton and New York Railroad Company, and all their leased, controlled, or operated lines.

Lehigh Valley system, now comprising the Lehigh Valley Railroad Company and all its leased, controlled, or operated lines.

Pennsylvania system, now comprising the Allegheny Valley; Cumberland Valley; Cincinnati and Muskingum Valley; Grand Rapids and Indiana; Northern Central; Pennsylvania; Pennsylvania Company; Philadelphia, Wilmington and Baltimore; Pittsburgh, Cincinnati, Chicago and St. Louis, and the Terre Haute and Indianapolis (Vandalia Line) railroad companies, and all their leased, controlled, or operated lines.

Vanderbilt system, now comprising the Beech Creek; Canada Southern and its leased lines; Dunkirk, Allegheny Valley and Pittsburg; Lake Shore and Michigan Southern; Michigan Central and its leased lines; New York Central and Hudson River; New York, Chicago and St. Louis; Pittsburgh and

Lake Erie; Rome, Watertown and Ogdensburg; Walkill Valley and the West Shore railroad companies, and all their leased, controlled, or operated lines.

Wabash system, now comprising the Wabash Railroad Company and all its leased, controlled, or operated lines east of the Mississippi River.

SECTION 2. Additional managers representing other systems or companies which are now or may hereafter become parties to this agreement may be designated by such systems or companies under the authority and rules of the board of control.

SECTION 3. Each manager shall hold office during the continuance of this agreement, subject to the pleasure of, and shall be compensated by, the system appointing him.

ARTICLE FIVE.

RELATING TO THE DUTIES AND POWERS OF THE MANAGERS.

SECTION 1. The managers shall have their principal office in New York City, and shall continue in session subject to their rules. They shall elect a chairman annually.

SECTION 2. The managers shall adopt their rules and perfect their organization. It shall, however, require the affirmative votes of three-fourths of their entire number to adopt any proposition coming before them.

SECTION 3. In considering questions which exceptionally affect the interests of any company party hereto unrepresented upon the board of managers, such company shall be advised thereof and be afforded an opportunity under the rules of the managers for presenting to them its views before final action is taken.

SECTION 4. The managers shall construe this agreement and all resolutions adopted thereunder.

SECTION 5. All applications for differentials and for changes in rates, fares, charges, and rules shall be made to the managers. Their action upon differentials and upon all questions except as to rates and fares shall be subject to appeal, but only to the arbitrators. Their action as to rates and fares (except differentials) shall be subject to appeal only to the board of control.

Decisions and orders of the managers shall be complied with until such appeals are decided.

ARTICLE SIX.

APPOINTMENT OF COMMISSIONERS.

The managers may appoint not more than three commissioners, and shall define their powers and duties.

ARTICLE SEVEN.

RATES, FARES, CHARGES, AND RULES.

SECTION 1. The duly published schedules of rates, fares, and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall within ten days after this agreement becomes effective file with the managers copies of all such schedules of rates, fares, and charges and the rules applicable thereto.

SECTION 2. The managers shall from time to time recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement. No company party hereto shall through any of its officers or agents deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.

SECTION 3. The powers conferred upon the managers shall be so construed and

exercised as not to permit violation of the interstate-commerce act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall cooperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder.

ARTICLE EIGHT.

PROPORTIONS OF COMPETITIVE TRAFFIC.

The managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement, so far as can be legally done.

ARTICLE NINE.

RELATIONS TO NONCONCURRING COMPANIES, AND DIVISIONS OF RATES AND FARES.

SECTION 1. The managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement, which fail or decline to observe the rates, fares, charges, and rules established under this agreement. The interests of companies parties hereto injuriously affected by such action of the managers shall, in such instances, be accorded reasonable protection in so far as the managers can legally do so.

SECTION 2. When in their judgment necessary to the purposes of this agreement, the managers may determine the divisions of rates and fares between connecting companies parties hereto and between them and connections not parties hereto, keeping in view uniformity and the equities involved.

ARTICLE TEN.

LIMITATION OF POWERS OF FREIGHT LINES.

It is recognized and agreed that economy in the operation of through cooperative and commission freight lines and the limitation or termination of many of their existing powers and functions are absolutely required, and the companies parties hereto will actively cooperate with the managers and so manage such lines as to accomplish such results.

ARTICLE ELEVEN.

MANAGERS MAY ORGANIZE JOINT AGENCIES.

The managers shall have authority to organize such joint freight and passenger agencies as they may deem desirable, provided that if such joint agencies are established they shall be so arranged as will give proper representation to each company party hereto.

ARTICLE TWELVE.

MANAGERS TO APPROVE CONTRACTING AGENCIES.

No soliciting or contracting passenger or freight agency shall be maintained directly or indirectly by any of the companies parties hereto or by any freight line in connection with the traffic covered by this agreement, except with the approval of the managers, and no person who is decided by the managers to be objectionable shall be employed or continued in such agency.

ARTICLE THIRTEEN.

MANAGERS TO DEFINE DUTIES OF CONTRACTING AGENTS.

SECTION 1. The managers shall define the authority and duties of all persons acting as contracting and soliciting freight and passenger agents in relation to the traffic covered hereby, and, with due regard to the relative interests involved, they may determine the number of such persons to be employed.

The parties hereto shall observe and enforce the orders of the managers from time to time issued in that behalf.

SECTION 2. Such contracting and soliciting agents as the managers appoint shall be carried upon the pay rolls of the association.

SECTION 3. The Grand Trunk Company may appoint soliciting agents to be located at such points in Canada as may be necessary to meet the competition of Canadian lines not parties hereto, but such persons shall in all respects be subject to the rules of the managers.

ARTICLE FOURTEEN.

COMPLAINTS AND INVESTIGATIONS THEREOF.

When, in the judgment of the managers their information or any complaint so warrants, the officials and employees of the companies parties hereto may be examined, and in such investigation any or all officials or employees may be notified to attend, and any or all matters affecting directly or indirectly the traffic herein covered may be considered.

ARTICLE FIFTEEN.

REPORTS AND DATA TO BE FURNISHED.

The companies parties hereto agree to furnish to the managers all reports, papers, and information relating to the traffic covered hereby which may be requested by them.

ARTICLE SIXTEEN.

FORFEITURES FOR VIOLATIONS OF AGREEMENT.

For any action by any party hereto which, in the judgment of the managers, constitutes a violation of this agreement, the offending company shall forfeit to the association a sum to be determined by the managers, not exceeding five thousand dollars; but where the gross receipts of the transaction in which this agreement is violated shall exceed five thousand dollars, the offending party shall, at the discretion of the managers, forfeit a sum not exceeding such gross receipts. Such forfeitures shall be applied to the payment of the expenses of the association, except that the offending company shall not participate in such application of its own forfeiture.

ARTICLE SEVENTEEN.

DEPOSITS, EXPENSE FUND, AND PROVISION FOR FORFEITURES.

SECTION 1. Upon the call of the managers, after this agreement becomes effective, each company party hereto shall deposit with them the sum of five thousand dollars, and in addition thereto, upon their like call, such further sums monthly, based upon the gross earnings of each company party hereto from the traffic covered hereby, as the managers may decide to be necessary to defray the expenses of the association, including the salaries of the commissioners and arbitrators, and to provide for such forfeitures as may be adjudged.

SECTION 2. Any forfeiture made by any company party hereto, under the rules, shall be taken from the sums contributed by such company and charged in whole to its account. If its deposit at the time, exclusive of its said original contribution of five thousand dollars, shall be insufficient, it shall pay to the managers such deficiency within fifteen days after the forfeiture is finally adjudged.

SECTION 3. The balance of said deposits remaining at the expiration of this agreement shall be divided between the companies then parties hereto in the ratio in which they have contributed, less the amounts forfeited.

ARTICLE EIGHTEEN.

RETIREMENT FROM THE AGREEMENT.

Any party retiring from this agreement before the final completion of the time herein fixed, except by unanimous consent of the parties hereto, shall not be entitled to any refund from the residue of deposits remaining at the close of this agreement, but if any company fails to observe and be governed by this agreement, which fact shall be determined by the arbitrators, and then fails to pay its forfeitures within fifteen days after such decision of the arbitrators, then any other company may withdraw from this agreement upon giving thirty days' written notice to the managers, and such company so withdrawing shall be entitled to the residue of the funds it has contributed.

ARTICLE NINETEEN.

BOARD OF ARBITRATION.

SECTION 1. There shall be a permanent board of arbitration consisting of three disinterested persons, to which appeals shall be made as to all questions, including differentials arising under this agreement, except the determination of rates and fares.

SECTION 2. All differences between the parties hereto as to any lawful measure necessary to carry out the objects of the association, except as to rates and fares, shall be submitted to and be finally decided by the arbitrators.

SECTION 3. Pending decisions of the arbitrators the decisions and orders of the board of control and managers shall prevail.

SECTION 4. Hearings shall be had upon all questions arbitrated, under the rules established by the arbitrators and approved by the board of control, and the decision of the arbitrators or of any two of them shall be final.

ARTICLE TWENTY.

AMENDMENTS.

Amendments to this agreement shall only be made by the unanimous vote of the parties hereto.

ARTICLE TWENTY-ONE.

WHEN AGREEMENT BECOMES EFFECTIVE, AND ITS DURATION.

SECTION 1. This agreement shall not be effective until it shall have been approved by the boards of directors of the several companies parties hereto. Certified copies of resolutions giving such approval shall be filed with the managers.

SECTION 2. This agreement shall take effect January 1st, 1896, and shall continue in existence for five years thereafter. After said period, any company may retire therefrom upon giving ninety days' written notice of its desire to do so.

The Philadelphia and Reading Railroad Company being legally incapacitated from signing this contract at present, but having so far as it can do so indicated through its president and receivers and proposed reorganization committee its desire to act in harmony therewith and observe its terms, it is understood that the parties hereto will waive the signature of that company until it is reorganized and be bound by this agreement only so long as that company observes its conditions, which fact shall be determined by the arbitrators provided herein.

In witness whereof the corporations parties hereto have caused the foregoing agreement to be signed by their respective presidents and the seal of their respective corporations to be attached hereto.

ALLEGHENY VALLEY RAILWAY COMPANY,
[L. S.] W. H. BARNES, *President.*
THE BALTIMORE AND OHIO RAILROAD COMPANY,
[L. S.] By CHAS. F. MAYER, *President.*
Attest,
ANDREW ANDERSON, *Secretary.*
THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY COMPANY,
[L. S.] By EDWARD R. BACON, *its President.*
Attest,
EDWARD BRUCE, *Secretary.*
CENTRAL RAILROAD CO. OF NEW JERSEY.
[L. S.] J. R. MAXWELL, *President.*
Attest,
SAM'L KNOX, *Secretary.*
CHESAPEAKE AND OHIO RAILWAY CO.,
[L. S.] By M. E. INGALLS, *President.*
THE CHICAGO AND ERIE RAILROAD COMPANY,
[L. S.] By J. G. MCCULLOUGH, *President.*
THE CHICAGO AND GRAND TRUNK RY. CO.,
[L. S.] By L. J. SEARGEANT, *its President.*
THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RY. CO.,
[L. S.] By M. E. INGALLS, *President.*
THE PEORIA AND EASTERN RY. CO.,
[L. S.] By M. E. INGALLS, *President.*

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
[L. S.] By SAM. SLOAN, *President.*
Attest,
FRED. F. CHAMBERS, *Secretary.*

THE DETROIT, GRAND HAVEN AND MILWAUKEE RY. COMPANY,
[L. S.] By L. J. SEARGEANT, *its President.*

ERIE RAILROAD CO.,
[L. S.] E. B. THOMAS, *President.*

THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY,
[L. S.] By J. H. P. HUGHART, *Second Vice-President.*
Attest:
R. R. METHEANY, *Secretary.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
[L. S.] By L. J. SEARGEANT, *its General Manager.*

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
[L. S.] By D. W. CALDWELL, *President.*
Attest:
N. BARTLETT, *Ass't Secretary.*

LEHIGH VALLEY R. R. CO.,
[L. S.] E. P. WILBUR, *President.*
Attest:
JNO. R. FANSHAWE, *Secretary.*

THE MICHIGAN CENTRAL RAILROAD COMPANY,
[L. S.] By H. B. LEDYARD, *President.*
Attest:
E. D. WORCESTER, *Secretary.*

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
[L. S.] By CHAUNCEY M. DEPEW, *President.*
Attest:
E. D. WORCESTER, *Secretary.*

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.
[L. S.] By S. R. CALLAWAY, *its President.*
Attest:
ALLYN COX, *Secretary.*

NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY,
[L. S.] By T. P. FOWLER, *President.*
Attest:
R. D. RICKARD, *Secretary.*

THE NORTHERN CENTRAL RAILWAY COMPANY,
[L. S.] By G. B. ROBERTS, *President.*
Attest:
STEPHEN W. WHITE, *Secretary.*

PENNSYLVANIA COMPANY,
[L. S.] By G. B. ROBERTS, *President.*
Attest:
S. B. LIGGETT, *Secretary.*

THE PENNSYLVANIA RAILROAD COMPANY,
[L. S.] By G. B. ROBERTS, *President.*
Attest:
J. C. SIMS, *Secretary.*

THE PHILADELPHIA & READING RAILROAD COMPANY,
By action of its receivers and board of managers pursuant to the last clause of this agreement, and duly filed. (See attached copy.—F. H. H.)

THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY,
[L. S.] By G. B. ROBERTS, *President.*
Attest:
D. S. NEWHALL, *Assistant Secretary.*

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
[L. S.] By D. W. CALDWELL, *President.*
Attest,
JOHN G. ROBINSON, *Secretary.*

THE PITTSBURGH AND WESTERN RAILWAY COMPANY,
[L. S.] By THOS. M. KING, *President.*
Attest,
T. J. CRUMP, *Secretary.*

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY CO.,
By G. B. ROBERTS, *President.*

[L. S.]
Attest,
S. B. LIGGETT, *Secretary.*

TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
By W. R. MCKEEN, *President.*

[L. S.]
Attest,
GEO. E. FARRINGTON, *Secretary.*

THE TOLEDO, PEORIA AND WESTERN RAILWAY COMPANY,
By E. T. LEONDARD, *President.*

[L. S.]
Attest:
E. D. USNER, *Secretary.*

[L. S.]
THE WABASH RAILROAD CO.,
By O. D. ASHLEY, *President.*

Attest:
J. C. OTTESON, *Secretary.*

[L. S.]
THE WEST SHORE RAILROAD COMPANY,
By CHAUNCEY M. DEPEW, *President.*

Attest:
E. V. W. ROSSITTER, *Secretary.*

A true copy of the original on file in the office of the Joint Traffic Association, 143 Liberty st., New York City.

FRANK H. HOYT, *Secretary.*

Sworn to before me this 23rd day of Dec., 1895.

JAS. H. REILLY,
Notary Public, N. Y. Co.

"The receivers of the Philadelphia and Reading Railroad Company, having duly considered the articles of organization of the Joint Traffic Association, now under discussion by the companies constituting the Trunk Line and Central Traffic Association, approve the spirit and purpose thereof, and authorize Mr. Joseph S. Harris to express on our behalf our willingness to be governed by the terms thereof in the conduct of the competitive traffic to be transmitted over the lines of railroad under our charge, so far as he may be advised by counsel that the same may be lawfully done. Also, to agree in our behalf to contribute towards the expenses of the maintenance of the Joint Traffic Association such amounts as shall not exceed the rate of contribution hitherto made by us for the maintenance of the Trunk Line Association."

I hereby certify that the foregoing is a true and correct extract from the minutes of the meeting of the receivers of the Philadelphia and Reading Railroad Company, held October 28, 1895.

(Signed)
W. R. TAYLOR,
Secretary to the Receivers.

"Mr. Harris stated to the receivers the substance of the conference held yesterday in New York with the representatives of the companies who are about to form the Joint Traffic Association, and read the modification of the second section of the fifth article which had been agreed upon entitling this company to a hearing before any action by the managers should become effective in cases exceptionally affecting the interests of the Reading Company. After full consideration Mr. Harris's action was approved, and he was authorized to state that the conduct of the competitive traffic to be transmitted over the lines of the Reading Railroad Company shall be governed by the terms of the proposed agreement so far as he may be advised by counsel that the same may be lawfully done."

I hereby certify that the foregoing is a true and correct extract from the minutes of the meeting of the receivers of the Philadelphia and Reading Railroad Company, held November 20, 1895.

(Signed)
W. R. TAYLOR,
Secretary to the Receivers.

"The president reported that after the passage of the resolutions of the board at their meeting of October 29th, at a meeting of the committee in charge of the preparation of the articles of organization of the Joint Traffic Association, and afterwards at the meeting of the presidents of the Trunk Line Association and the Central Traffic Association, on November 19th, he had carefully stated the action which the company and the receivers were prepared to take in relation to the Joint Traffic Association. After considerable discussion of the proposed exceptional relations of

the Reading Railroad Company to the Joint Traffic Association, the president's meeting agreed that the Reading's position should be recognized, and the action authorized by the receivers and the company should be taken as a sufficient indication of their purpose to act in harmony with the other transporting companies. A number of verbal alterations, mostly made for the purpose of bringing the organization more thoroughly into harmony with the existing laws, but none of them involving changes of importance, had been made in the articles of organization since it was last presented to this board. The president had urged upon the meeting that some provision should be made to better care for the interests of companies unrepresented in the board of managers, in regard to questions exceptionally affecting their interests which should come before that board, and had obtained the insertion of section three, article six, which gives to such companies the right to be heard before the board of managers on questions which exceptionally affect their interests.

The president laid the articles of organization, as finally adopted at the meeting of November 19th, before the board, and stated in detail the main features of the articles, whereupon it was, upon motion,

Resolved, That the board approves of the spirit and purpose of the Joint Traffic Association as expressed in the formal contract now presented, and requests the receivers to act in harmony with the provisions of the agreement dated November 19, 1895, constituting that association, so far as they may be advised by counsel that the same may be lawfully done.

I hereby certify that the foregoing is a true and correct extract from the minutes of the meeting of the board of managers of the Philadelphia and Reading Railroad Company, held December 11, 1895.

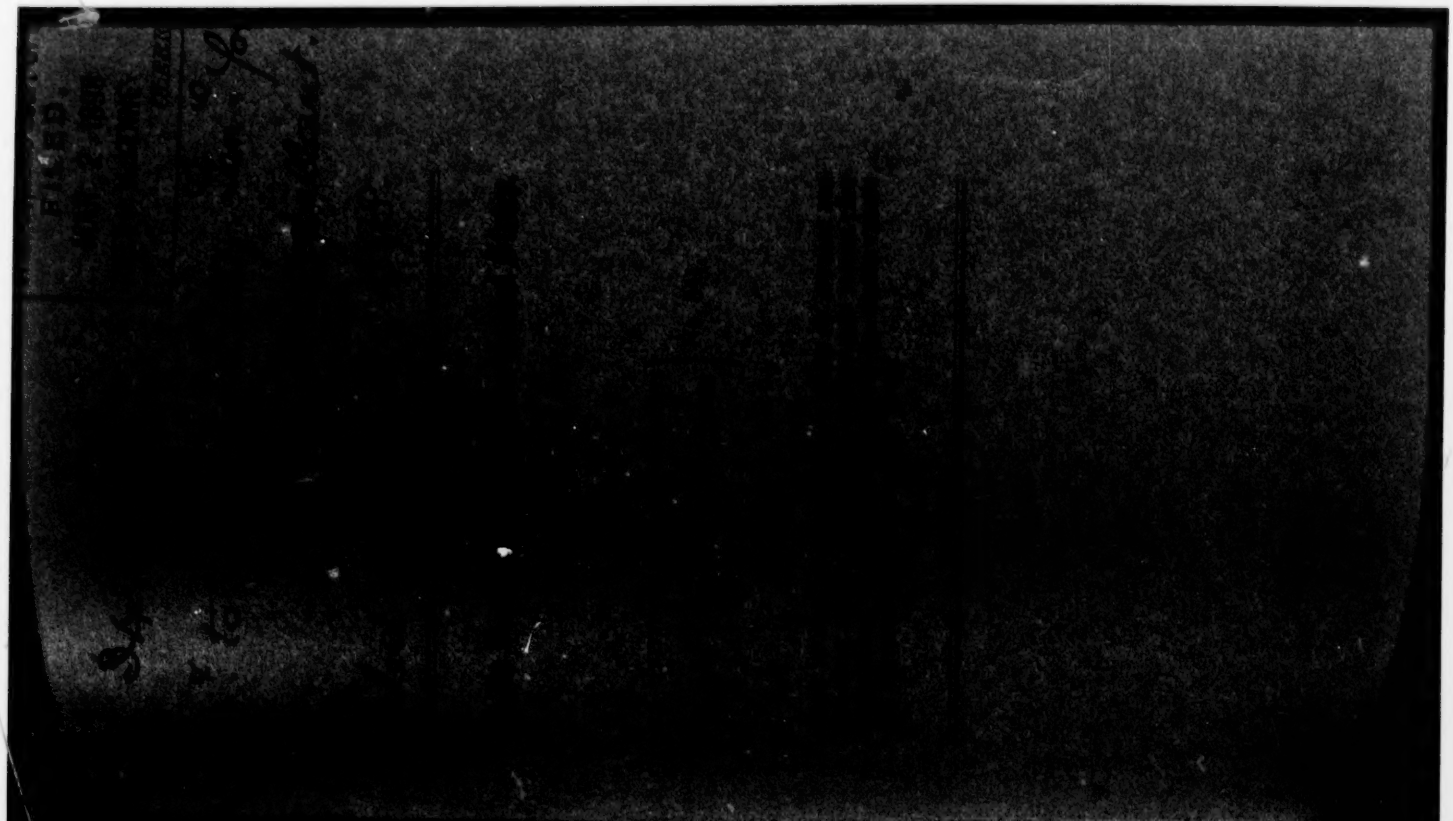
[SEAL.] (Signed) W. R. TAYLOR, *Secretary.*

A true copy of the original on file in the office of the Joint Traffic Association, 143 Liberty street, New York City.

F. H. HOYT, *Secretary.*

Sworn to before me this 23 day Dec., 1895.
[SEAL.]

JAS. H. REILLY,
Notary Public, N. Y. Co.



In the United States Circuit Court of Appeals.

SIXTH CIRCUIT.

THE UNITED STATES OF AMERICA *v.* THE ADDYSTON PIPE AND STEEL COMPANY, Dennis Long & Co., Howard-Harrison Iron Company, Anniston Pipe and Foundry Company, South Pittsburg Pipe Works, and Chattanooga Foundry and Pipe Works.	No. 498.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

SUBMITTED MAY 27, 1897. DECIDED FEBRUARY 8, 1898.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

This was a proceeding in equity begun by petition filed by the attorney-general on behalf of the United States against six corporations engaged in the manufacture of cast iron pipe, charging them with a combination

and conspiracy in unlawful restraint of interstate commerce in such pipe in violation of the so-called anti-trust law passed by Congress, July 2, 1890. The defendants were the Addyston Pipe & Steel Company, of Cincinnati, Ohio; Dennis Long & Co., of Louisville, Kentucky; the Howard-Harrison Iron Company, of Bessemer, Alabama; the Anniston Pipe & Foundry Company, of Anniston, Alabama; the South Pittsburg Pipe Works, of South Pittsburg, Tennessee, and the Chattanooga Foundry & Pipe Works, of Chattanooga, Tennessee.

The petition prayed that all pipe sold and transported from one state to another, under the combination and conspiracy described herein, be forfeited to the petitioner and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants and perpetually enjoining them from operating under the same and from selling said cast iron pipe in accordance therewith to be transported from one state into another.

The defendants filed a joint and separate demurrer to the petition in so far as it prayed for the confiscation of goods in transit, on the ground that such proceedings under the anti-trust act are not to be had in a court of equity, but in a court of law. In addition to the demurrer, the defendants filed a joint and separate answer, in which they admitted the existence of an association between them for the purpose of avoiding the great losses they would otherwise sustain, due to ruinous competition between defendants, but denied that their association was in restraint of trade, state or interstate, or

that it was organized to create a monopoly and denied it was a violation of the anti-trust act of Congress.

Testimony in the form of affidavits was submitted by petitioner and defendants and by stipulation it was agreed that the final hearing might be had thereon. Judge Clark, who presided in the circuit court, dismissed the petition on the merits. His opinion is reported in the 78 Fed. Rep. 712.

From the minutes of the association a copy of which was put in evidence by the petitioner, it appeared that prior to December 28, 1894, the Anniston Company, the Howard Harrison Company, the Chattanooga Company and the South Pittsburg Company had been associated as the Southern Associated Pipe Works. Upon that date the Addyston Company and Dennis Long & Co. were admitted to membership and the following plan was then adopted:

"First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16" and smaller, shall be divided equally among six shops.

"Second. The bonuses on the next 75,000 tons, 30" and smaller, sixes to be divided among five shops, South Pittsburg not participating.

"Third. The bonuses on the next 40,000 tons, 36" and smaller, sizes to be divided among four shops, Anniston and South Pittsburg not participating.

"Fourth. The bonuses on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg and Anniston not participating.

"The above division is based on the following tonnage of capacity:

South Pittsburg	15,000 tons
Anniston	30,000 tons
Chattanooga	40,000 tons
Bessemer	45,000 tons
Louisville	45,000 tons
Cincinnati	45,000 tons

"When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addyston Pipe & Steel Company, Dennis Long & Co., and the Howard Harrison Company."

"It was thereupon resolved:

"First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896.

"Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

"Third. The Addyston Pipe & Steel Company shall handle the business of the Gas and Water Companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the

parties to this agreement shall bid on such work such reasonable prices as they shall dictate.

"Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for Gas and Water Works in above named cities.

"Fifth. The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for Gas and Water Companies in above named cities.

"Sixth. The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above named cities.

"Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for Gas and Water Companies in the above named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

"Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and co-operating with them; thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

"Note.—It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

"The following bonuses were adopted for the different states as named below: All railroad or culvert pipe or

pipe for any drainage or sewerage purposes on 12" and larger sizes shipped into bonus territory shall pay a bonus of $1.00 per ton. On all sizes below 12" and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of $2.00 per ton.

List of Bonuses.

Alabama	$3 00	Idaho	$2 00
B'gham, Ala	2 00	Nev	3 00
Anniston, Ala	2 00	Oklahoma	3 00
Mobile, Ala	1 00	Wis	2 00
Arizona Ter	3 00	Texas, Interior	3 00
California	1 00	Texas Coast	1 00
Colorado	2 00	Wash'ton Ter	1 00
Ind. Ter	3 00	Michigan	1 50
North C	1 00	West Va	1 00
Tenn., East of C'Land	2 00	Kansas	2 00
Tenn. Middle and West	3 00	Ky	2 00
Illinois, except Madison and East St. Louis, as previously provided	2 00	La	3 00
		Miss	4 00
		Mo	2 00
Wyoming	4 00	Montana	3 00
Oregon	1 00	Nebraska	3 00
Ohio	1 50	N. Mex	3 00
N. D	2 00	S. C	1 00
S. D	2 00	Minn	2 00
Florida	1 00	Utah	4 00
Georgia	2 00	Indiana	2 00
Atlanta, Ga	2 00	Iowa	2 00
Ga. Coast Pts	1 00		

"All other territory free.

"On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved shall be $2.00 per ton."

The states for sales in which bonuses had to be paid into the association were called "pay" territory as distinguished from "free" territory in which defendants

were at liberty to make sales without restriction and without paying any bonus.

The by-laws provided for an auditor of the association whose duty it was to keep account of the business done by each shop both in pay and free territory. On the 1st and 16th of each month, he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same and debit credit balance of each company."

The system of bonuses as a means of restricting competition and maintaining prices was not successful. A change was therefore made by which prices were to be fixed for each contract by the association and except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895 in the words following:

"Whereas, the system now in operation in this association of having a fixed bonus on the several states, has not in its operation resulted *in the advancement in the prices of pipe as was anticipated, except in reserved cities*, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed. Therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city to whom all

inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops."

In pursuance of the new plan it was further agreed "that all parties to this association having quotations out shall notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted and upon all business accepted on and after June 1st, bonuses shall be fixed by the committee."

At the meeting of December 19, 1895, it was moved and carried, that upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, prices and bonuses should be fixed at a regular or called meeting of the principals.

At the meeting of December 20, 1895, the plan for division of bonuses originally adopted, was modified by making the basis the total amounts shipped into "pay" territory rather than the totals shipped into "pay" and "free" territory.

To illustrate the mode of doing business the following excerpt from the minutes of the meetings of December 20, 1895, February 14, 1896, and March 13, 1896, is given.

"It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for $23.40, delivered. Carried. It was moved that Anniston participate in the bonus and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of $8."

"Moved that 'bonus' on Anniston's Atlanta Water Works contract be fixed at $7.10, provided freight is $1.60 a ton. Carried."

An illustration of the manner in which "reserved" cities were dealt with may be seen in the case of a public letting at St. Louis. On February 4, 1896, the water department of that city let bids for 2,800 tons of pipe. St. Louis was "reserved" to the Howard-Harrison Company, of Bessemer, Ala. The price was fixed by the association at $24 a ton, and the bonus at $6.50. Before the letting the vice-president of this company wrote to the other members of the association under date of January 24, 1896, as follows:

"I write to say that in view of the fact that I do not as yet know what the drayage will be on this pipe. I prefer that if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than $27 for the pipe, and 2 3-4 cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders."

The contract was let to the Howard-Harrison Company, of Bessemer, at $24, who allowed the Shickle, Harrison & Howard Company, a pipe company of St. Louis, not in the association, but having the same president as the Howard-Harrison Company, of Bessemer, to fill part of the order. The only other bidders were the Addyston Pipe & Steel Company, and Dennis Long & Co., the former bidding $24.37, and the latter $24.57. The evidence shows that the Chattanooga Foundry could have furnished this pipe, delivered in St. Louis, at from

$17 to $18 and could have made a profit on it at that price. The record is full of instances of a similar kind, in which, after the successful bidder had been fixed by the "auction pool" or had been fixed by the arrangement as to "reserve" cities, the other defendants put in bids at the public letting as high as the selected bidder requested, in order to give the appearance of active competition between defendants.

In January, 1896, after the auction pool had been in operation for more than six months, the Chattanooga Company wrote a letter to its representative in the central committee to outline its policy for the new year, and the statements of the letter cast much light on the prices bid and the character of bonuses fixed. The letter is dated January 2, 1896, and is as follows:

"Dear Sir:—Referring to our policy for 1896, in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement as to the amount of business done last year in Pay Territory and from estimates that we have made for business, that will come into that territory for 1896, we have been able to determine to what point we could bid on work and take contracts, and if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., Cincinnati, and other shops, who have been bidding bonuses of $6 or $8 per ton, can come out and make any money if they continue to bid such bonus. In

the case of the Howard-Harrison Iron Co., people on Jacksonville, Fla. The truth of the business is they are losing money at the prices they bid for this work. If they take the contract at $19 delivered, it will only net $16 at the shop after they have paid back the bonus of $4.75; if they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they of course calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid and we only hope they will keep it up as it is only money in our pockets. As long as there is no money to us let them make the pipe, as we shall continue to do so.

"For the present you will adopt the following basis:

"On 16" and under Standard weights, $14.25 at shop.

"On 18" and 36" Standard weights, $13.

"On 16" and under light weights $14.50 to $14.75 at shop.

"That is you will bid all over $13, $14.25 and $14.50 on work. If we get work at these prices it will be satisfactory. If the others run bonus above this point, let them take it as it will be more money to us to take the bonus.

"We note Mr. Thornton's report of average premiums from June 1st, to December, that the average was $3.63. The average bonuses that are prevailing to-day are $7 to $8. We can not expect this to continue and we think your estimate of $6 ton average bonus is high—as we do not believe the premiums for '96 will average that price,

unless there is a decided change for the better in business. We find there was sold and shipped into Pay Territory from January 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons, and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year; more than that, probably overrun 240,000 tons from the fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market last year, or last season, from the fact that they were out of funds. On the basis as given you above, if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would pay us the average 'bonus' which might be from $3.50 to $5 on our 40,000. If we can not secure business in 'Pay Territory' at paying prices, we think we will be able to dispose of our output in 'Free Territory,' and of course make some profit on that.

"At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines and one or two other points, they are losing from $2.50 to $3 per ton, that is, provided 'bonuses' would not be returned to them. Therefore when business goes at a loss, we are willing that other shops make it."

Another letter written by the same company pending a trouble over a letting at Atlanta is significant. The Anniston Company to whom Atlanta had been "reserved" made its bid so high ($24) that a Philadelphia pipe firm, R. D. Wood & Co., had been able to underbid the Anniston Company in spite of difference in

freights. All the bids had been rejected as too high and upon a second letting, Anniston's bid was $1.25 a ton less and the job was awarded to it. The charge was then made by Atlanta persons that there was a "trust" or "combine." This was vigorously denied. The letter of the Chattanooga Company evoked by this difficulty was dated February 25, 1896, and read as follows:

"Gentlemen:—We are in receipt of a carbon copy of your favor of the 24th instant to F. B. Nichols, V.-P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape and that R. D. Wood & Company should make a lower bid by one dollar a ton than the Southern shops. You know we have always been opposed to special customers and 'Reserved Cities,' we do not think that it is the right principle and we believe if the present association continues, that all special customers and 'Reserved Cities' should be wiped out; there is no good reason why we should be allowed to handle New Orleans, you Atlanta, Howard-Harrison Iron Co., St. Louis, or South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry and we believe that the result would be more benefit to all concerned, if all business was made competitive. It is hardly right, and we believe if you will think over the matter carefully, you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. We can not explain our position to the Atlanta people and we consider it is detrimental to our business and think no combination should

have the power to force us into such a position. The same argument will apply with you as to New Orleans, St. Louis and other places.

"We think this matter should be considered seriously and some action taken that will result in re-establishing ourselves (I mean the four Southern shops), in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man has no doubt told them all about our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected and have had all their business for the past two years is proof to them that such a 'Combination' exists, and they state that if they they find out positively that we are working together, they will never receive a bid from any one of us again. We can not afford to leave these people under that impression and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities 'reserved' is all based upon mere sentiment and no good reason exists why it should be so. We believe that, as a general thing, we have had our prices entirely too high and especially do we believe this has been the case as to prices in 'reserved cities.' The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been and always will be, when high prices are named, to create a bad feeling and an agitation against the 'Combination.' There is no reason why Atlanta, New Orleans, St. Louis or Omaha, should be made to pay higher prices for their pipe than other places near them who do not use any-

thing like the amount of pipe and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta as we would as soon sell our pipe anywhere else, only as stated above, it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of."

It appears quite clearly from the prices at which the Chattanooga and the South Pittsburg Companies offered pipe in "free" territory that any price which would net them from $13 to $15 a ton at their foundries would give them a profit. Pipe was freely offered by the defendants in "free" territory more than five hundred miles from their foundries at less prices than their representative board fixed prices for jobs let in cities in "pay" territory nearer to defendants' foundries by three hundred miles or more.

The defendants adduced many affidavits of a formal type, chiefly from persons who had been buying pipe from defendants and other companies who testified in a general way that the prices at which the pipe had been offered by defendants all over the country had been reasonable, but in not one of the affidavits was any attempt made to give figures as to cost of production and freight and in not a single case were the specific instances shown by the evidence for the petitioner disputed.

The evidence as to the capacity of the defendants' mills is by no means satisfactory. The division of bonuses was based on an aggregate yearly output of 220,000 tons, but there are averments in the answer that indicate that this was not a statement of the actual limit

of capacity, but was only taken as a standard of restricted output upon which to calculate an equitable division of bonuses. Nowhere in the large mass of affidavits is there any statement of the *per diem* capacity of defendants' mills. Taking their aggregate capacity, however, as 220,000 tons, that of the other mills in the "pay" territory was 170,500 tons, and that of the mills in "free" territory was 348,000 tons, according to the affidavit of the chief officer of one of defendants. Of the non-association mills in the "pay" territory one was at Pueblo, Col., another was in the state penitentiary at Waco, Tex., and a third in Oregon. Their aggregate annual capacity was 45,500 tons. Another non-association mill was the Shickle, Howard-Harrison mill of St. Louis, Mo., with a capacity of 12,000 tons. John W. Harrison, who was president of this company, was also president of the Howard-Harrison mill of Bessemer, Ala., which was a member of the association, and it appears that an order taken by the Bessemer mill at St. Louis was partly filled by the St. Louis mill. The other mills in the "pay" territory were one at Columbus, Ohio, with an annual capacity of 30,000 tons, one at Cleveland, Ohio, of 60,000 tons, one at Newcomerstown, in Northeastern Ohio, of 8,000 tons, and one at Detroit, Mich, of 15,000 tons, and their aggregate annual capacity was 113,000 tons. In the "free" territory there was one mill in Eastern Virginia with an annual capacity of 16,000 tons, four mills in Eastern Pennsylvania with a capacity of 87,000 tons, three mills in New Jersey with a capacity of 210,000 tons, and two

mills in New York, one at Utica and another at Buffalo, with an aggregate capacity of 35,000 tons.

The evidence was scanty as to rates of freight upon iron pipes, but enough appeared to show that the advantage in freight rates which the defendants had over the large pipe foundries in New York, Eastern Pennsylvania and New Jersey in bidding on contracts to deliver pipe in nearly all of the "pay" territory varied from $2.00 to $6.00 a ton, according to the location.

The defendants filed the affidavits of their managing officers in which they stated generally that the object of their association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between defendants which would have carried prices far below a reasonable point; that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible and more than his due proportion; that the prices fixed by the association were always reasonable and were always fixed as they must have been, with reference to the very active competition of other pipe manufacturers for every job; that the reason why they sold pipe at so much cheaper rates in the "free" territory, than in the "pay" territory, was because they were willing to sell at a loss to keep their mills going rather than to stop them; that the prices at a city like St. Louis in which the specifications were detailed and precise were

higher because pipe had to be made especially for the job and they could not use stock on hand.

The defendants devoted a good deal of evidence to showing that the stenographer who furnished copies of the minutes of the association and of the correspondence between the members had a pecuniary motive in thus betraying the confidence of his employers, but no evidence was offered by them to contradict any statements made by him or to impeach the accuracy of the copies he has produced. On one point alone was he contradicted and that was in his statement that the bonuses represented the increase over and above a reasonable price made possible by the combination of the defendants.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first section of the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," passed July 2, 1890, 26 Stat. 209, declares illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The second section makes it a misdemeanor for any person to monopolize or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. The fourth section of the act gives the circuit courts of the United States jurisdiction to hear and determine proceedings in equity brought by the district attorneys of the United States under the direction of the attorney-general to restrain violations of the act.

Two questions are presented in this case for our decision. First, was the association of the defendants a contract, combination or conspiracy in restraint of trade as the terms are to be understood in the act? Second, was the trade thus restrained trade between the states?

The contention on behalf of defendants is that the association would have been valid at common law and that the Federal Antitrust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the Supreme Court of the United States in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, in which it was held that contracts in restraint of interstate transportation were within the statute whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment necessarily under public control and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise which is purely a private business, having in it no element of a public or quasi public character. Whether or not there is substance in such a distinction, a question we do not decide, it is certain that if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of trade, it is within the inhibition of the statute if the trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages

in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts. *Mogul Steamship Company* v. *McGregor, Gow & Company*, Appeal Cases (1892), 25; *Hornby* v. *Close*, L. R. 2, Q. B. 153; *Lord Campbell, C. J., in Hilton* v. *Eckersly* 6 E. & B. 47, 66; *Hannen, J., in Farrer* v. *Close*, L. R. 4, Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

The argument for defendants is that their contract of association was not and could not be a monopoly because their aggregate tonnage capacity did not exceed thirty per cent of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association because the prices fixed by it

had to be fixed with reference to the very active competition of pipe companies which were not members of the association and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade from which he had thus excluded one competitor and by the same means might exclude others. Chief Justice Parker, in 1711, in the leading case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 190, stated these objections as follows:

"1st. The mischief which may arise from them, 1st, to the party by the loss of his livelihood and the subsistence of his family; 2d, to the public by depriving it of an useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible."

The reasons were stated somewhat more at length in *Alger* v. *Thacher*, 19 Pickering, 51, 54, in which the Supreme Judicial Court of Massachusetts said:

"The unreasonableness of contracts in restraint of trade and business is very apparent, from several obvious considerations.

"1. Such contracts injure the parties making them because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of present gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

"2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

"3. They discourage industry and enterprise and diminish the products of ingenuity and skill.

"4. They prevent competition and enhance prices.

"5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations who have the means unless restrained by law to exclude rivalry, monopolize business and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than

they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in *Alger* v. *Thacher*, have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states.

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Henry V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance as an incentive to industry and honest dealing in trade, that after a man had built up a business with an extensive good will he should be able to sell his business and good will to the best advantage and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade when partners dissolved and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again when two men become partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise and energy to carry on a successful business,

and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members with a view of securing their entire effort in the common enterprise were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property.

Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly, but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers. In a case of this last kind, *Mallan* v. *May*, 11 M. & W. 652, Baron Parke said, "Contracts for the partial restraint of trade are upheld not because they are advantageous to the individual with whom the contract is made and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest and have been supported; such is the case of the disposing of a shop in a

particular place with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good will and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry. . . . And such is the class of cases of much more frequent occurrence and to which this present case belongs of a tradesman, manufacturer or professional man taking a servant or clerk into his service with a contract that he will not carry on the same trade or profession within certain limits. . . . In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade and the communication of his own skill and experience from the fear of his afterward having a rival in the same business."

For the reasons given then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints

attempted thereby are reasonably necessary, (1, 2, 3), to the enjoyment by the buyer of the property, good will or interest in the partnership bought, or (4) to the legitimate ends of the existing partnership, or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold, or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business.

Under the first class, come the cases of *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *Forle* v. *Parke*, 131 U. S. 88; *Nordenfeldt* v. *The Maxim Nordenfeldt Company*, Appeal Cases (1894), 534; *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *Leather Cloth Company* v. *Lorsont*, L. R. 9 Eq. 345; *Whittaker* v. *Howe*, 3 Beav. 383; *Diamond Match Company* v. *Roeber*, 106 N. Y. 473; *Tode* v. *Gross*, 127 N. Y. 480; *Beal* v. *Chase*, 31 Mich. 190; *Hubbard* v. *Miller*, 27 Mich. 15; *National Benefit Co.* v. *Union Hospital Co.*, 45 Minn. 272; *Whitney* v. *Slayton*, 40 Me. 224; *Pierce* v. *Fuller*, 8 Mass. 222; *Richards* v. *American Desk & Seating Company*, 87 Wis. 503. In the second class are *Tallis* v. *Tallis*, 1 El. & Bl. 391, and *Lange* v. *Werk*, 2 O. S. 520. In the third class are *Troy Laundry Machine Company* v. *Dolph*, 138 U. S. 617; 28 Fed. Rep. 553; and *Mathews* v. *The Associated Press*, 136 N. Y. 333. In the fourth class are *American Strawboard Company* v. *Haldeman*, 83 Fed. R. 619, and *Hitchcock* v. *Anthony*, 83 F. R. 779, both decisions of this court; *Oregon Navigation Co.* v. *Winsor*, 20 Wallace, 64; *Dunlop* v. *Gregory*, 9 N. Y. 241; *Hodge* v. *Sloan*, 107 N. Y.

244, while in the fifth class are the cases of *Horner* v. *Ashford*, 3 Bingh. 322; *Homer* v. *Graves*, 7 Bingh. 735; *Hitchcock* v. *Coker*, 6 Ad. & El. 454; *Ward* v. *Byrne*, 5 M. & W. 547; *Dubowski & Sons* v. *Goldstein*, 1 Q. B. (1896), 478; *Peels* v. *Saalfeld*, 2 Ch. (1892), 149; *Taylor* v. *Blanchard*, 13 Allen, 370; *Keeler* v. *Taylor*, 53 Pa. St. 467; *Herreshoff* v. *Boutineau*, 17 R. I. 3.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law, but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horner* v. *Graves*, 7 Bingham, 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in *Nordenfeldt* v. *The Maxim Nordenfeldt Co.*, Appeal Cases (1894), 535, 567), used the following language: "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party

requires can be of no benefit to either; it can only be oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which in the execution of the contract or enjoyment of its fruits he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case if the restraint exceeds the necessity presented by the main purpose of the contract it is void for two reasons; first, because it oppresses the covenantor without any corresponding benefit to the covenantee, and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein, is merely to restrain competition and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which,

partial restraint is permitted and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. In *Mitchell* v. *Reynolds*, 1 P. Wms., 181, the leading early case on the subject in which the main object of the contract was the sale of a bakehouse, and there was a covenant to protect the purchaser against competition by the seller in the bakery business, Chief Justice Parker laid down the rule that, it must appear before such a covenant could be enforced, that the restraint was not general but particular or partial as to places or persons, and was upon a good and adequate consideration so as to make it a proper and useful contract. Subsequently it was decided in *Hitchcock* v. *Coker*,

6 Ad. & El. 454, that the adequacy of the consideration was not to be inquired into by the court if it was a legal one and that the operation of the covenant need not be limited in time.

More recently the limitation that the restraint could not be general or unlimited as to space has been modified in some cases by holding that if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. *Whittaker* v. *Howe*, 3 Beav. 383; *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. Cases, 345; *Rousillon* v. *Rousillion*, 14 Ch. Div. 351; *Nordenfeldt* v. *Maxim Nordenfeldt Co.*, Appeal Cases (1894), 535; see also *Fowle* v. *Park*, 131 U. S. 88; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473. But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade, than did the courts of an earlier time. It is true that there are some cases in which the courts mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade have set sail on a sea of doubt and have assumed the power to say in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not. The manifest danger in the

administration of justice according to so shifting, vague and indeterminate standard would seem to be a strong reason against adopting it. The cases assuming such a power in the courts are *Wickens* v. *Evans*, 3 Young & Jervis, 318; *Collins* v. *Locke*, 4 Appeal Cases, 674; *Ontario Salt Co.* v. *The Merchants Salt Company*, 18 Grant's (Up. Can.), 540; *Kellogg* v. *Larkin*, 3 Pinney, 123; *Leslie* v. *Lorillard*, 110 N. Y. 519.

In *Wickens* v. *Evans*, three trunk manufacturers of England who had competed with each other throughout the realm to their loss, agreed to divide England into three districts, each party to have one district exclusively for his trade, and if any stranger should invade the district of either as a competitor, they agreed "to meet to devise means to promote their own views." The restraint was held partial and reasonable because it left the trade open to any third party in either district. In answer to the suggestion that such an agreement to divide up the beer business of London among the London brewers would lead to the abuses of monopoly, it was replied that outside competition would soon cure such abuses, an answer that would validate the most complete local monopoly of the present day. It may be, as suggested by the court, that local monopolies can not endure long because their very existence tempts outside capital into competition, but the public policy embodied in the common law requires the discouragement of monopolies, however temporary their existence may be. The public interest may suffer severely while new competition is slowly developing. The case can hardly be reconciled with later cases, hereafter to be referred to in England and America. It

is true that there was in this case no direct evidence of a desire by the parties to regulate prices, and it has been sometimes explained on the theory that the agreement was solely to reduce the expenses incident to a business covering the realm by restricting its territorial extent; but it is difficult to escape the conclusion that the restraint upon each two of the three parties was imposed to secure to the other a monopoly and power to control prices in the territory assigned to him, because the final clause in the contract implies that when it was executed there were no other competitors except the parties in the territory divided.

Collins v. *Locke* was a case in the Privy Council. The action was brought to enforce certain articles of agreement by and between four of the leading master stevedore contracting firms in Melbourne, Australia, who did practically all the business at that port. The court (composed of Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier), describes the scope and purposes of the agreement and the view of the court as follows: "The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it and so to prevent competition, at least among themselves, and also it may be to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means, that is by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade." No attempt is made to justify the view

thus comprehensively stated or to support it by authority, or to reconcile it with the general doctrine of the common law that contracts restraining competition, raising prices and tending to a monopoly as this is conceded by the court to have been are void. The court ignores the public interest that prices shall be regulated by competition and assumes the power in the court to uphold and enforce a contract securing a monopoly if it affect only one port so as to be but a partial restraint of trade. The case is directly at variance with the decision of the Supreme Court of Illinois in *Moore* v. *Bennett*, 141 Ill. 69, hereafter discussed and can not be reconciled in principle with many of the other cases cited.

The Canadian case of the *Ontario Salt Co.* v. *The Merchants Salt Co.*, is another one upon which counsel for the defendants rely. That was the decision of a vice-chancellor. Six salt companies, in order to maintain prices, combined and put their business under the control of a committee and agreed not to sell except through the committee. It was held that because it appeared that there were other salt companies in the province and because the combiners denied that they intended to raise prices, but only to maintain them, the contract of union was not in unlawful restraint of trade. The conclusion and argument of the court in *Salt Co.* v. *Guthrie*, 35 O. S., hereafter stated would seem to be a sufficient answer to this case.

Kellogg v. *Larkin*, 3 Pinney, 123, was an early case in Wisconsin in which the action was on the covenant of a warehouse man in a lease of his warehouse, by which he

agreed to devote his services to the lessee at certain compensation and not to purchase or store wheat in the Milwaukee market. The covenant was held valid. Had nothing else appeared in the case the conclusion would have been clearly right because such a covenant might well have been reasonably necessary to the protection of the lessee in his enjoyment of the warehouse and the good-will of the lessor. But it further appeared that this lease with the covenant was only one of many such executed by the warehousemen of Milwaukee to the united grain dealers of that city to enable the latter to obtain absolute control of the wheat market in Milwaukee. The court held the latter combination valid also. The decision can not be upheld in view of the more modern authorities hereafter referred to.

The case of *Leslie* v. *Lorillard*, 110 N. Y. 519, would seem to be an authority against our view. In that case a stockholder sought to restrain the payment of an annual payment about to be made by the Old Dominion Steamship Company under a contract by which it bought off the Lorillard Steamship Company from continuing in competition with it in carrying passengers and freight between New York and Norfolk. The contract was held valid although it had no purpose except the restraining of competition and so far as appears the obtaining of the complete control of the business. The case is rested on *Diamond Match Company* v. *Roeber*, 106 N. Y. 473, which was a case of the purchase of property and good will. It proceeds on the general proposition "that competition is not invariably a public benefaction; for it

may be carried on to such a degree as to become a general evil," and thus leaves it to the discretion of the court to say how much competition is desirable and how much is mischievous, and accordingly to determine whether a contract is bad or not. The case is directly opposed to *Anderson* v. *Jett*, 89 Ky. 375, hereafter cited. It should be said that nothing appears in the report of the case to show directly that the purpose of the contract was to reserve the entire business to the Dominion Company or to secure to it the power of regulating prices but this natural inference from the terms of the contract is not negatived.

The case of *Mogul Steamship Company* v. *McGregor, Gow & Co.*, Appeal Cases (1892), 25, has been cited to sustain the position of the defendants. It does not do so. It was a suit for damages brought by a company engaged in the tea-carrying trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade and to obtain control of the trade themselves. It appeared that the defendants agreed to conform to a plan of association, by which they should constantly underbid the plaintiff, and take away his trade by offering exceptional and very favorable terms to customers dealing exclusively with the members of the association; and that they did this to control the business the next season after he had been thus driven out of competition. It was held by the House of Lords that this was not an unlawful and indictable conspiracy giving rise to a cause

of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46), and Lord Hannen, in his, (at page 58), distinctly say that the contract of association was void as in restraint of trade, but all the Law Lords were of opinion that contracts void as in restraint of trade were not unlawful in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the Mogul Steamship Company case has in this discussion, makes for, rather than against, our conclusion.

Two other cases deserve mention here. They are *The Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353, and *Gloucester Isinglass & Glue Company* v. *Russian Cement Co.*, 154 Mass. 92. In these cases it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient, are not articles of prime or public necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case, the article involved was a fastening of a certain shade roller and in the other was glue made from fish skins. We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the

varying economical opinions of its individual members It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court in *Gamewell Fire Alarm Tel. Co.* v. *Crane*, 160 Mass. 50, held that fire alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas and sewer pipe.

There are other cases upon which counsel of defendants rely which in our judgment have no bearing on the issue, or if they have, are clearly within the rules we have already stated. One is a case in which a railroad company made a contract with a sleeping car company by which the latter agreed to do the sleeping car business of the railway company on a number of conditions, one of which was that no other company should be allowed to engage in the sleeping car business on the same line. *Chicago, &c., Railroad Co.* v. *Pullman Southern Car Company*, 139 U. S. 79. The main purpose of such a contract is to furnish sleeping car facilities to the public. The railroad company may discharge this duty itself to the public and allow no one else to do it, or it may hire some one to do it and to secure the necessary investment of capital in the discharge of the duty may secure to the sleeping car company the same freedom from competition that it would have itself in discharging the duty. The restraint upon itself is properly proportioned to and is only ancillary to the main purpose of the contract which

is to secure proper facilities to the public. Exactly the same principle applies to similarly exclusive contracts with express companies, and stockyard delivery companies. The Express Cases, 117 U. S. 1; *Covington Stockyards Co.* v. *Keith*, 139 U. S. 128; *Butchers & Drovers Stockyards Co.* v. *Louisville & Nashville R. R. Co.*, 31 U. S. Ap. 252.

The fact is that it is quite difficult to conceive how competition would be possible upon the same line of railway between sleeping car companies, or express companies. Such contracts involve the hauling of sleeping cars, or express cars on each express train, the assignment of offices in each station, and various running arrangements which it would be an intolerable burden upon the railroad company to make and execute for two companies at the same time. And the same is true of contracts with a stock delivery company. The railway company could not ordinarily be expected to have more than one general station for the delivery of cattle in any one town; it would only be required by the nature of its employment to furnish such facilities as were reasonably sufficient for the business at that place. There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these than there would be to a restriction upon a lessor not to allow the subject matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege when granted is hardly capable of other than exclusive enjoyment. The public interest is satisfactorily secured by the requirement which may be enforced by any member of the public, to wit, that the charges allowed shall

not be unreasonable, and the business is of such a public character that it is entirely subject to legislative regulation in the same interest.

Having considered the cases upon which the counsel for the defendants have relied to maintain the proposition that contracts having no purpose but to restrain competition and maintain prices, if reasonable, will be held valid, we must now pass in rapid review the cases that make for an opposite view.

In *People* v. *Sheldon*, 139 N. Y. 251, all the coal dealers in the city of Lockport, N. Y., entered into a contract of association, forming a coal exchange to prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due protection of the parties to it against ruinous rivalry and although no attempt was made to charge unreasonable or excessive prices, it was inimical to trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said Andrews, C. J. (264): "If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing." See to

the same effect *Judd* v. *Harrington*, 139 N. Y. 105; *Leonard* v. *Poole*, 114 N. Y. 371; *The DeWitt Wire Cloth Company* v. *The New Jersey Wire Cloth Company*, 16 Daly, 529.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173, five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight and to fix proportion of sales by each. Competition was not destroyed because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void as in illegal restraint of trade and competition and tending to injure the public. In *Nester* v. *Brewing Co.*, 161 Pa. St. 473, forty-five brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet as it was an article of merchandise, the contract was held void as in restraint of trade and tending to a monopoly.

In *Salt Company* v. *Guthrie*, 35 O. S. 666, the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves and agreed to sell only at prices fixed by a committee of their number. The Supreme Court of Ohio held the contract void. Judge McIlvaine, who delivered the opinion of the court, said: "The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade and for that reason on the ground of public

policy courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." Other Ohio cases which presented similar facts and in which the same rule was enforced are *Emery* v. *Candle Co.*, 47 O. S. 320, and *Hoffman* v. *Brooks*, 11 Weekly Law Bulletin, 258.

In *Anderson* v. *Jett*, 89 Kentucky 375, two owners of steamboats running on the Kentucky river made an agreement to keep up rates and divide net profits to prevent ruinous competition and reduced rates. The contract was held void.

In *Chapin* v. *Brown*, 83 Iowa, 156, the grocerymen in a town in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid because in restraint of trade and tending to create a monopoly.

In *Craft* v. *McConoughy*, 79 Ill. 346, five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain and to divide profits in a certain proportion. This was held void as in restraint of trade and tending to create a monopoly. In *Moore* v. *Bennett*, 140 Ill. 69, articles of association entered into by only a part of the stenographers of Chicago to fix a

schedule of prices and prevent competition among their members and a consequent reduction of prices, was held void. The court said: "A combination among a number of persons engaged in a particular business to stifle or prevent competition and thereby to enhance or diminish prices to a point above or below what they would be, if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee by which the vendor agrees not to engage in the same business within a limited territory and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased." As already said this case is in direct conflict with *Collins* v. *Locke*, 4 Appeal Cases, 674, discussed above. To the same effect as *Mac* v. *Bennett* are *Ford* v. *Milkshippers Association*, 155 Ill. 166, and *Bishop* v. *American Preservers Co.*, 157 Ills. 284.

In *Milwaukee Masons & Builders Association* v. *Niezorwski*, 95 Wis. 129, the suit was on a note given in pursuance of the secret rules of an association of sixty out of the seventy-five master masons in Milwaukee, by which all bids for work about to be let were first made to the association and the lowest bidder was then required to add 6 per cent to his bid, and if the bid was more than 8 per cent below the next lowest bidder, more than 6 per cent might be added. Each member was required to pay to the association 6 per cent of his estimates when due, for subsequent distribution. In declaring the contract void, the court said: "The combination in question

is contrary to public policy and strikes at the interests of those of the public desiring to build and between whom and the association or the members thereof there exist no contract relations."

In *Vulcan Powder Co.* v. *Powder Co.*, 96 Cal. 510, four powder companies of California agreed that each should sell at a price to be fixed by a committee of their representatives and should pay over to the others the profits or any excess of sales over a fixed proportion of the total sales. The contract was held void.

In *Texas Oil Co.* v. *Adoue*, 83 Texas, 650, five owners of cotton seed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guaranteed profits to the four others, and suit was brought on the guaranty. It was held void as restraining trade and tending to a monopoly even though the evidence failed to establish that it effected a monopoly.

In *India Bagging Association* v. *Kirk & Co.*, 14 La. Ann. 168, eight commercial firms in New Orleans holding a large quantity of cotton bagging, entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that the contract was "palpably and unequivocally a combination in restraint of trade and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order and can not be enforced in a court of justice."

In *Hilton* v. *Eckersley*, 6 E. & B. 47, it was held that an agreement between eighteen cotton manufacturers to submit to the control of a committee of their number for

twelve months the question as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade. In *Cranston v. Whitelegg Brothers*, 63 Law Times (N. S.), 455, a case in the Queen's Bench Division before Day & Lawrence, J. J., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers Association, which recited that the object of the association was to maintain the price of mineral water and bound the members for ten years not to sell at less that 9d. a dozen bottles or at not less than any higher price fixed by the committee, on penalty of ten pounds for each violation. Day, Justice, said: "If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public of the legislature, and therefore, of the judges on the matter and many old fashioned offenses has disappeared; but the rule still obtains that combinations for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable; it is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases, the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect and there was no relation of partnership or of vendor and vendee, or of employer and employe. Where such relation exists between the parties, as already stated restraints are usually

enforceable if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But in recent years, even the fact that the contract is one for the sale of property or of business and good will or for the making of a partnership or a corporation has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step farther than those already considered. In them, the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary and becomes the main purpose of the contract and the transfer of property and good will or the partnership agreement is merely ancillary and subordinate to that purpose. The principal cases of this class are *Richardson* v. *Buhl*, 77 Mich. 632; *Arnot* v. *Pittston Coal Company*, 68 N. Y. 558; *People* v. *Milk Exchange*, 145 N. Y. 267; *People* v. *New York Sugar Refining Co.*, 54 Hun. 366; *State* v. *Nebraska Distilling Co.*, 29 Neb. 70; *State* v. *Standard Oil Co.*, 49 O. S. 137; *American Biscuit & Mfg. Co.* v. *Klotz*, 44 Fed. Rep. 721; *The Distilling & Cattle Feeding Co.* v. *People*, 156 Ills. 448; *Pittsburg Carbon Co.* v. *McMillan*, 119 N. Y. 46; *National Harrow Co.* v. *Hench*, 83 Fed. Rep. 36; *Pacific Factor Co.* v. *Adler*, 90 Cal. 110; *Santa Clara Co.* v. *Hayes*, 76 Cal. 387.

In addition to the cases cited, there are others which sustain the general principle, but in them there existed

the additional reason for holding the contracts invalid, that the parties were engaged in a quasi public employment. They are *Gibbs* v. *The Baltimore Gas Co.*, 130 U. S. 396; *People* v. *Chicago Gas Trust Co.*, 130 Ills. 268; *Stockton* v. *Central R. R. Co.*, 50 N. J. Eq. 52, and *Transportation Company* v. *Pipe Line Co.*, 22 W. Va. 600; *Hooker* v. *Vandewater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Central R. R. Co.* v. *Collins*, 40 Ga. 582; *Hazlehurst* v. *Savannah*, 43 Ga. 1.

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants being manufacturers and vendors of cast iron pipe entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania and Virginia, constituting considerably more than three-quarters of the territory of the United States and significantly called by the associates "pay" territory. Their joint annual output was 220,000 tons. The total capacity of all the other cast iron pipe manufacturers in the "pay" territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado and Oregon, so far removed from that part of

the "pay" territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in "pay" territory and outside of the combination, one was at Columbus, Ohio, two in Northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the "pay" territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga and South Pittsburg, and Anniston and Bessemer were grouped much nearer to the center of the "pay" territory. The freight upon cast iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which eastern manufacturers would have pay to deliver pipe in "pay" territory, the defendants, by controlling two-thirds of the output in "pay" territory, were practically able to fix prices. The competition of the Ohio and Michigan mills of course somewhat affected their power in this respect in the northern part of the "pay" territory, but the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix

prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true, but within that limit they could fix prices as they chose. The most cogent evidence that they had this power is the fact everywhere apparent in the record that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below upon affidavits solely and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact.

The defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories and, by keeping prices just low enough to prevent competition by eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of

the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In *United States* v. *E. C. Knight Company*, 156 U. S. 1, 16, Chief Justice Fuller, in speaking for the court said: "Again all the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast iron pipe was sold in "pay" territory were reasonable. A great many affidavits of purchasers of pipe in "pay" territory, all drawn by the same hand or from the same model, are produced in which the affiants say that in their opinion the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But if it were important we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants.

The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through "pay" territory to a greater or less degree and especially at "reserved" cities.

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast iron pipe is sold is by contracts let after competitive bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association, had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other and thus to prevent competition is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. *Breslin* v. *Brown*, 24 O. S. 565; *Atchason* v. *Mallon*, 43 N. Y. 147; *Loyd* v. *Malone*, 23 Ill. 41:

Wooton v. *Hinkle*, 20 Mo. 290; *Phippen* v. *Stickney*, 3 Mete. 384; *Kearney* v. *Taylor*, 15 How. 494, 519; *Wilbur* v. *How*, 8 Johns, 443; *Hannah* v. *Fife*, 27 Mich. 172; *Gibbs* v. *Smith*, 115 Mass. 592; *Swan* v. *Chorpenning*, 20 Cal. 182; *Gardner* v. *Morse*, 25 Me. 140; *Ingram* v. *Ingram*, 4 Jones, L. 188; *Brisbane* v. *Adams*, 3 N. Y. 129; *Woodruff* v. *Berry*, 40 Ark. 251; Wald's Pollock on Contracts, 310, note by Mr. Wald, and cases cited. The case of *Jones* v. *North*, L. R. 19 Eq. 426, to the contrary can not be supported. The largest purchasers of pipe are municipal corporations and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy and so brings it within that term of the Federal statute.

The second question is whether the trade restrained by the combination of the defendants was interstate trade. The mills of the defendants were situated, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. The invariable custom in sales of pipe required the seller to deliver the pipe at the place where it was to be used by the buyer and to include in the price the cost of delivery. The contracts, as the answer of the defendants aver, were invariably made after public letting at the home and in the state of the buyer. The "pay" territory, sales in which it was the professed object of the

defendants to regulate by their contract of association, included thirty-six states. The cities which were especially "reserved" for the benefit of the defendants were Atlanta and Anniston, "reserved" to the Anniston mill in Alabama, New Orleans and Chattanooga, "reserved" to the Chattanooga mill in Tennessee, St. Louis and Birmingham, "reserved" to Bessemer mill in Alabama, Omaha, "reserved" to the South Pittsburg mill in Tennessee, Louisville, New Albany and Jeffersonville, "reserved" to Dennis Long & Co., of Louisville, and Cincinnati, Newport and Covington, "reserved" to the Addyston mill in Ohio. Under the agreement every request for bids from any place, except the "reserved" cities, sent to any one of the defendants was submitted to the central committee, who fixed a price and the contract was awarded to that member, who would agree to pay for the benefit of the other members of the association the largest "bonus."

In the case of the "reserved" cities, the successful bidder having been already fixed, the association determined the price and bonus to be paid. The contract of association restrained every defendant except the one selected to receive the contract from soliciting (in good faith) or making, a contract for pipe with the intending purchaser at all, and restrained the defendant so selected from making the contract except at the price fixed by the committee. In cases of pipe to be purchased in any state of the thirty-six in "pay" territory, except four, each one of the defendants, by his contract of association, restrained his freedom of trade in respect to making a contract in that state for the sale of pipe to be delivered

across state lines, five of them agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price. With respect to sales in Ohio, Kentucky, Tennessee and Alabama, the effect of the contract of association was to bind at least three, sometimes four and sometimes five of the defendants not to make a contract at all in those states for the sale and delivery of pipe from another state, and if the job were assigned as it might be to one living in a different state from the place of the contract and delivery, its effect would be to bind him not to sell and deliver pipe across state lines at less than a certain price. It thus appears that no sale or proposed sale can be suggested within the scope of the contract of association with respect to which that contract did not restrain at least three, often four, more often five and usually all of the defendants in the exercise of the freedom, which, but for the contract would have been theirs, of selling in one state pipe to be delivered from another state at any price they might see fit to fix.

Can there be any doubt that this was a restraint of interstate trade and commerce? Mr. Justice Field, in the *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, said: "Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, a law of Tennessee, which imposed a tax on all "drummers" who solicited orders on samples was held unconstitutional in so far as it applied to the drummer

of an Ohio firm, who was soliciting orders for goods to be sent from Ohio to purchasers in Tennessee, on the ground that it was a tax on interstate commerce. In delivering the opinion of the court in that case, Mr. Justice Bradley said (p. 497), that a tax on the sale of goods or *the offer to sell them* before they are brought into the state, was clearly a tax on interstate commerce. He further said: "The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The principle thus announced has been reaffirmed by the court in *Corson* v. *Maryland*, 120 U. S. 502; in *Asher* v. *Texas*, 128 U. S. 129; in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, and in *Brennan* v. *Titusville*, 153 U. S. 289. The point of these cases was emphasized by the distinction taken in *Emert* v. *Missouri*, 156 U. S. 296, in which the validity of a law of Missouri, imposing a tax on peddlers, was in question. The plaintiff in error, convicted under the law of failure to pay the tax, was the selling agent of a New Jersey sewing machine manufacturing company, who carried the machine for sale with him in his wagon. It was held, that in such a case the machine having become part of the mass of property in the state, the tax on the peddler was not a tax on interstate commerce. If, then, the soliciting orders for, and the sale of goods in one state to be delivered from another state, is interstate commerce in its strictest and highest sense, such that the states are excluded by the Federal constitution from a right to regulate or tax the same, it seems clear that contracts in restraint of such solicita-

tions, negotiations and sales are contracts in restraint of interstate commerce. The anti-trust law is an effort by Congress to regulate interstate commerce. Such commerce as the states are excluded from burdening or regulating in any way by tax or otherwise, because of the power of Congress to regulate interstate commerce, must of necessity be the commerce which Congress may regulate and which by the terms of the anti-trust law it has regulated. We can see no escape from the conclusion, therefore, that the contract of the defendants was in restraint of interstate commerce.

The learned judge who dismissed the bill at the circuit, was of opinion that the contract of association only indirectly affected interstate commerce and relied chiefly for this conclusion on the decision of the Supreme Court in the case of *United States* v. *E. C. Knight Co.*, 156 U. S. 1. In that case the bill filed under the anti-trust law sought to enjoin the defendants from continuing a union of substantially all the sugar refineries of the country for the refining of raw sugars. The Supreme Court held that the monopoly thus effected was not within the law, because the contract or agreement of union related only to the manufacture of refined sugar and not to its sale throughout the country, that manufacture preceded commerce, and although the manufacture under a monopoly might, and doubtless would, indirectly, affect both internal and interstate commerce, it was not within the power of congress to regulate manufactures within a state on that ground. The case arose on a bill in equity filed by the United States under the anti-trust act, praying for relief in respect of certain agreements under which the

American Sugar Refining Company had purchased the stock of four Philadelphia sugar refining companies with shares of its own stock, whereby the American Company acquired nearly complete control of the manufacture of refined sugar in this country. The relief sought was the cancellation of the agreements of purchase, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act.

The Chief Justice, in delivering the judgment of the court said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life to the enjoyment of which by a large part of the population of the United States, interstate commerce is indispensable and that therefore, the general government in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. . . . Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and it affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which

commerce is governed or whenever the transaction is itself a monopoly of commerce. . . . The regulation of commerce applies to the subjects of commerce and not to matters of internal police. *Contracts to buy, sell or exchange goods to be transported among the several states*, the transportation and its instrumentalities and articles bought, sold or exchanged for the purpose of such transit among the states or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

The chief justice then refers to the prior case of *Coe* v. *Errol*, 116 U. S. 517, in which it was held that logs were not made subjects of interstate commerce by the mere intent of the owner to ship them into another state, so that state taxation upon them could be regarded as a burden upon interstate commerce, until that intent had been carried so far into execution that "they had commenced their final movement from the state of their origin to that of their destination." *Kidd* v. *Pearson*, 128 U. S. 1, is also referred to. In that case it was held that a law of Iowa, which forbade the manufacture of spirituous liquor except for certain purposes was not in conflict with the commerce clause of the Federal constitution, although it appeared by proof that the liquor was to be manufactured only with intent to ship the same out of the state. The Chief Justice further said: "It

was in the light of well settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. . . . There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." We have thus considered and quoted from the decision in the Knight case at length, because it was made the principal ground for the action of the court below, and is made the chief basis of the argument on behalf of the defend-

ants here. It seems to us clear that from the beginning to the end of the opinion, the chief justice draws the distinction between a restraint upon the business of manufacturing and a restraint upon the trade or commerce between the states in the articles after manufacture, with the manifest purpose of showing that the regulating power of Congress under the constitution could affect only the latter while the former was not under Federal control and rested wholly with the states. Among the subjects of commercial regulation by Congress, he expressly mentions "contracts to buy, sell or exchange goods to be transported among the several states," and leaves it to be plainly inferred that the statute does embrace combinations and conspiracies, which have for their object to restrain, and which necessarily operate in restraint of, the freedom of such contracts.

The citation of the case of *Coe* v. *Errol*, was apt to show that merchandise before its shipment across state lines was not within the regulating power of Congress and *a fortiori* that its manufacture was not, while *Kidd* v. *Pearson*, clearly made the distinction between the absence of power in Congress to control manufacturing merely because the manufacturer intends to add to interstate commerce with the product, and the power which Congress has to prevent obstructions to interstate transportation in the product when made. But neither of these cases controls the one now under consideration. The subject matter of the restraint here was not articles of merchandise or their manufacture, but contracts for sale of such articles to be delivered across state lines and the negotiations and bids preliminary to the making

of such contracts, all of which, as we have seen, do not merely affect interstate commerce, but are interstate commerce. It can hardly be said that a combination in restraint of what is interstate commerce does not directly affect and burden that commerce. The error into which the circuit court fell, it seems to us, was in not observing the difference between the regulating power of Congress over contracts and negotiations for sales of goods to be delivered across state lines, and that over the merchandise, the subject of such sales and negotiations. The goods are not within the control of Congress until they are in actual transit from one state to another. But the negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across state lines are interstate commerce and so within the regulating power of Congress even before the transit of the goods in performance of the contract has begun.

The language of the chief justice in the last passages quoted above from his opinion upon which so much reliance was placed by the circuit court and the defendants' counsel at the bar is to be interpreted by the facts of the case before the court. The statement in the opinion that Congress did not intend by the anti-trust act to limit and restrict the rights of persons and corporations in the mere acquisition, control or disposition of property or to regulate the prices at which such property should be sold, or to make criminal the acts of persons or corporations in the acquisition and control of property which the states of their residence or creation sanctioned or permitted does not imply that Congress did not intend to strike down any combination which had

for its object the restraint and attempted monopoly of trade and commerce among a given number of states in specified articles of commerce and the resulting power to regulate prices therein. The obstacle in the way of granting the relief asked in *United States* v. *E. C. Knight Co.*, was (to use the language of the chief justice) that "the contracts and acts of the defendant related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations." The Supreme Court distinctly adjudged that "what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several states or with foreign nations." That the defendants in the present case combined and contracted with each other for the purpose of restraining trade and commerce among the states covered by their agreement, in the articles manufactured by them, is too clear to admit of dispute. In the E. C. Knight Company case, there was, the Supreme Court said, "nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." In the present case the proofs show that no one of the companies in this pipe-trust combination was allowed to send its goods out of the state in which they were manufactured except upon the terms established by the agreement. Can it be doubted that this was a direct restraint upon interstate commerce in those goods?

To give the language of the opinion in the Knight case the construction contended for by defendants, would be to assume that the court after having in the clearest

way distinguished the case it was deciding from a case like the one at bar for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which decided both. We can not concur in such an interpretation of the opinion.

Counsel for the defendants also find in the language of Mr. Justice Peckham, in the case of the *United States* v. *The Freight Association*, 166 U. S, 290, 313, 326, an argument against our conclusion in this case. The question in that case was whether the anti-trust act applied to railroad companies which combined in establishing traffic rates for the transportation of persons and property. It was vigorously contended on behalf of the railroad companies that the act was never intended to apply to them, because Congress had already provided for their regulation by the interstate commerce law. In meeting this position, Mr. Justice Peckham used the following language (p. 313): "We have held that the Trust Act did not apply to a company engaged in one state in the refining of sugar under circumstances detailed in the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, because the refining of sugar under those circumstances bore no distinct relation to commerce between the states or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the states would leave little for the act to take effect upon." Again, upon page 326, Justice Peckham repeats the same idea: "In the Knight Company case (*supra*) it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce and not to

monopolies in the manufacture even of a necessary of life. It is readily seen from these cases that if the act does not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative."

This is not a declaration that cases might not arise within the statute which were not combinations of common carriers in relation to interstate transportation. The language used means nothing more than that if such combinations were excluded from the effect of the act, the great and manifest scope for the operation of a Federal statute on such a subject would be denied to it. To give the language more weight would be to violate the first canon for the construction of a judicial opinion laid down by Chief Justice Marshal in *Cohens* v. *Virginia*, 6 Wheaton, 264, 399, 340: "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all cases is seldom completely investigated."

In re Greene 52 Fed. Rep. 104, cited for the defendants, is to be distinguished from the case at bar in exactly

the same way as the Knight Company Case. The indictment against Greene, drawn under the anti-trust act, charged him with being a member of a combination to acquire possession and control of seventy-five per cent of the distilleries of the country for the purpose of fixing the price of whisky and controlling the trade in it between the States. The immediate object of the combination was a monopoly in manufacture. The effect upon interstate trade in whisky was as indirect as was the monopoly of the refining of sugar in the Knight case upon interstate trade in that article.

The case of *Dueber Watch Company* v. *The Howard Co.*, 35 U. S. Ap. 16, can not be regarded as an authority upon either of the questions considered in this case, because of the division of opinion among the judges. It was a suit brought by a watch manufacturing company against twenty other companies to recover damages for a boycott of the plaintiff. The averment was that the defendants had agreed not to sell any goods manufactured by them to any person dealing with the plaintiff and had caused this to be known in the trade, and that they fixed an arbitrary price for the sale of their goods to the public and because plaintiff's competition interfered with their maintaining this price, they were using the boycott against plaintiff to stifle competition. The pleadings were not drawn with care to bring the case within the anti-trust law. The questions arose on demurrer to the bill. Judge Lacombe held that the facts stated gave rise to no cause of action; Judge Shipman held that the averments were not sufficient to show that the trade restrained was interstate, and Judge Wallace dissented on the ground that a

cause of action was sufficiently stated and that the restraint was upon interstate commerce. These varying views decided the case, but they certainly furnish no precedent or authority.

There is one case which seems to be quite like the one at bar. It is the case of *United States* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432, a decision by Judge Key at the circuit. The owners of coal mines in Kentucky entered into a contract of association with coal dealers in Nashville by which they agreed that the mine owners should only sell to dealers who were members and the members should only buy from mine owners who were members, and that the dealers should sell at certain fixed prices, of which the mine owners should receive a proportionate part, after payment of freight, and that prices might be raised by a vote of the association, in which case the addition to the price should be divided between the dealers and the mine owners. The contract recited that it was intended to establish and maintain the price of coal at Nashville. It was held to be an attempt to create a monopoly in the interstate trade in coal between Kentucky and Nashville, Tenn., and it was enjoined.

It is pressed upon us that there was no intention on the part of the defendants in this case to restrain interstate commerce and in several affidavits the managing officers of the defendants make oath that they did not know what interstate commerce was, and, therefore, that they could not have combined to restrain it. Of course the defendants, like other persons subject to the law, can not

plead ignorance of it as an excuse for its violation. They knew that the combination they were making contemplated the fixing of prices for the sale of pipe in thirty-six different states, and that the pipe sold would have to be delivered in those states from the four states in which defendants' foundries were situate. They knew that freight rates and transportation were a most important element in making the price for the pipe so to be delivered. They charged the successful bidder with a bonus to be paid upon *the shipment* of the pipe from his state to the state of the sale. Under their first agreement, the bonus to be paid by the successful bidder was varied according to the state in which the sale and delivery were to be made. It seems to us clear that the contract of association was on its face an extensive scheme to control the whole commerce among thirty-six states in cast iron pipe, and that the defendants were fully aware of the fact whether they appreciated the application to it of the anti-trust law or not.

Much has been said in argument as to the enlargement of the Federal governmental functions in respect of all trade and industry in the states, if the view we have expressed of the application of the anti-trust law in this case is to prevail, and as to the interference which is likely to follow with the control which the states have hitherto been understood to have over contracts of the character of that before us. We do not announce any new doctrine in holding either that contracts and negotiations for the sale of merchandise to be delivered across state lines are interstate commerce (see cases above cited), or that burdens

or restraints upon such commerce, Congress may pass appropriate legislation to prevent and courts of the United States may in proper proceedings enjoin. *In re* Debs, 158 U. S. 564. If this extends Federal jurisdiction into fields not before occupied by the General Government, it is not because such jurisdiction is not within the limits allowed by the Constitution of the United States.

The prayer of the petition that pipe in transportation under the contract of association be forfeited in a proceeding in equity like this is, of course, improper, and must be denied. The sixth section of the anti-trust act, after providing that property owned and in transportation from one state to another or to a foreign country under a contract inhibited by the act, "shall be forfeited to the United States," continues, "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." This requires a like procedure to that prescribed in Sections 3309–3391, R. S., and involves a trial by jury. The only remedy which can be afforded in this proceeding is a decree of injunction.

For the reasons given the decree of the circuit court dismissing the bill must be reversed with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast iron pipe described in the bill and substantially admitted in the answer, and from doing any business thereunder.

No. 341. 94.

MAR 4 1898
JAMES H. McKENNEY,
CLERK

Oral Argt. of Sol. Gen.l for Appt.

Filed Mar. 4, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
THE JOINT TRAFFIC ASSOCIATION, appellees.
} No. 341.

POINTS BY THE SOLICITOR-GENERAL ON ORAL ARGUMENT, IN REPLY TO MR. CARTER, MR. EDMUNDS, AND MR. PHELPS.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
THE JOINT TRAFFIC ASSOCIATION, appellees.
No. 341.

POINTS BY THE SOLICITOR-GENERAL ON ORAL ARGUMENT, IN REPLY TO MR. CARTER, MR. EDMUNDS, AND MR. PHELPS.

I.

It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the anti-trust law makes the agreement illegal and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provision of the law declaring the illegality and authorizing injunction proceedings.

II.

Mr. Carter said he would not reargue the questions considered in the Trans-Missouri Case, and then proceeded to discuss what constitutes an agreement among railroads in restraint of trade, insisting that one which only prevents competition for the purpose of maintaining *reasonable* rates is not one in restraint of trade.

In the Trans-Missouri Case this court held that such an agreement *is* in restraint of trade, regardless of its purpose and the actual result of its operation. So, after all, the argument of Mr. Carter was directed to a discussion anew of the questions argued and considered and settled by this court in the Trans-Missouri Case.

III.

It is insisted that an agreement in restraint of trade must restrain trade—that is, reduce or diminish it; that *trade* must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the Government and people from the creation of monopolies. It is a question of method

rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life.

IV.

It is said that competition is not trade, but a mere incident of trade; that what prevents competition does not necessarily injure trade; on the contrary, to restrict competition may benefit trade; that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the mass of the people; that there is a spirit of unrest, of dissatisfaction, and that to avoid the effects of ruinous competition among employers and employees combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it. Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand—a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result not from competition, but the throttling of competition by trusts and combinations, which seek to control production and transportation and dominate both

workingmen and consumers. Against these the individual citizen protests. He does not demand *no* competition, but *fair* competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

V.

It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it can not stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a valuable plant can not be withdrawn, nor can labor skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all. There are sections where a number of years ago it was profitable to make iron out of local ores. Millions of dollars were invested in furnaces. Workingmen skilled in iron-making settled there, and with their earnings bought property and built homes. Subsequently, in

other sections more accessible to the markets, with cheaper ores, modern furnaces were erected and cheaper iron began to be made. The old furnaces could not meet the competition of the new. They had to be abandoned. Was it possible to withdraw the capital invested in them? Not at all. It was lost. The workingmen, too, suffered. They were thrown out of work, ran up debts, lost their homes.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public, but the person or corporation or region which can not lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive business, and it ought to. It can afford to

carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest. The poorer roads can get the business by putting themselves in shape to do the business. Roads equally fitted to do the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result, naturally, not in ruining the roads, but in building them up. Under competition, the best road fixes the rate; under combination, the poorest road. Is it just to make the public pay rates from Chicago to the East fixed by the poorest system protected by the Joint Traffic Agreement?

VI.

It is contended there is no restraint on trade, because the railways still exist with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate can not be made except by resolution of the board of a member and after thirty days' notice to the Managers.

It is true the railways exist with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the

things transported. This operates as a burden upon commerce, and a restraint of trade.

If a State should levy a tax on goods transported through it, this court would hold such an act unconstitutional, because it laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition decreases the business of railroads but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates mean less traffic. It may be to the interest of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

VII.

It is insisted that rates must be stable, not subject to change; that a manufacturer can not safely make goods nor a dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious that the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter, by land and water, will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the interstate commerce law nor the Joint Traffic agreement attempts it. Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to

The Managers of the Association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency toward cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.

VIII.

Uniformity in rates is declared to be essential, and it is urged that the provisions of the interstate commerce law favoring uniformity can not be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the interstate commerce act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction in rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

Suppose two similar industries located in Pennsylvania, each supplying the New York market, and each equally distant from New York, but one located on the Pennsylvania and the other on the Lehigh Valley sys-

tem. For one industry the Lehigh Valley is the only line to New York; for the other the Pennsylvania. There is nothing in the interstate commerce act, or in the Joint Traffic Agreement, to prevent the Pennsylvania from reducing the rate to New York; nothing to prevent the Lehigh Valley from reducing such rate.

The uniformity demanded by the interstate commerce act is uniformity in the treatment by *each* railroad of *its own* patrons. The second section prohibits a common carrier from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for an equal distance. The third section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or the places served by *it*. And so, too, with reference to the long and short haul provisions in the fourth section.

The interstate commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was forbidden. Competition between railroads was preserved, and to secure the benefits of competition to all patrons of each road it was provided that the competition should be open and above board, so the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefits of competition to *all*, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it has to compete. The competition was to be restricted to where it belongs; between the railroads and not between the shippers. If a railroad can afford to carry the freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

In *Chicago & N. W. Ry. Co.* v. *Osborne* (52 Fed. Rep., 912) the circuit court of appeals for the eighth circuit, speaking by M . Justice Brewer, in construing the act to regulate commerce, said (p. 914):

> Congress has not attempted to require that tariffs on all roads be uniform, nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and of competition have as yet been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and Missouri River, a parallel and competing road with the defendant company; yet there is nothing in the commerce act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the act; and such reduction compels no change by its competitor or any other company. This is obvious from a mere reading of the act.

IX.

It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it, each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centers. The argument, then, amounts to this, that the rates on through traffic are to be kept up in order to preserve the weak roads as going concerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of Government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of the land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

X.

It is said that the interstate commerce act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition, but to preserve it and secure its benefits to all. Competition between independent lines was preserved and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform

fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons were prohibited. Thus the benefits of open competition were insured to all. The policy was—among the patrons of each road uniformity, but between the roads open competition.

In this connection let me direct the court to what Judge Cooley says in the first Report of the Interstate Commission, 1887, p. 33:

> The tendency to consolidation excited public distrust, being looked upon as *a device to avoid competition* and to deprive the public of the benefits of having more than one line of transportation for the same traffic, which, in some cases, had been the chief inducement to the building of particular lines. Laws were therefore passed forbidding consolidation.
>
> * * * * *
>
> The pooling system was looked upon with distrust by the public, mainly because *it seemed to be a scheme whereby competition between the roads could be obviated*, and rates for railroad service put up or kept up to unreasonable figures. But if railroad managers supposed that by this scheme they were to stop competition among themselves, the result has not answered their expectations. The competition has still gone on, each road striving to obtain as large a share of the business as possible, and no agreement

among them could altogether prevent a yielding to the pressure of shippers for lower rates.

* * * * *

The act to regulate commerce, expressing in that particular the desire of Congress to preserve to the people the benefits of competition, contains the following provision (citing the antipooling section):

XI.

The point is made that railways are public highways, and the furnishing of railway transportation a governmental function; therefore the Government should eliminate the advantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the Government may regulate it. Government, State and Federal, has done this, by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable nor desirable. Absolute uniformity, extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolutely arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers, without distinction. Each railroad should be required to treat its patrons—persons and places—with fairness and

equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary, it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this not only in rates but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for by Mr. Carter, would logically prevent all competition, whether in rates or service.

In *Ames* v. *Union Pacific R. Co.* (64 Fed. Rep., 165) Mr. Justice Brewer said (p. 175): "In the matter of transportation we are in an experimental or transitional stage," and characterized transportation as being still a *business* as distinguished from a system under Government control or restricted by Congress under laws fixing maximum charges. In another part of the opinion it is remarked (p. 172) that "railroad companies can not plead their own convenience or the effects of competition between themselves and other companies in restraint of the otherwise undeniable power of the State."

In *Int. Com. Com.* v. *B. & O. R. R. Co.* (145 U. S., 276) Mr. Justice Brewer, speaking for the court, said that the act to regulate commerce was not designed "to prevent competition between different roads." And in the same proceeding it was held in the circuit court by Judge Jackson, afterwards on the Supreme bench, that the act leaves the carriers free to fix their rates and secure business, as they were at common law subject only to leading prohibitions against unreasonable charges, unjust discriminations, and undue preferences. This ruling was

approved by this court, speaking by Mr. Justice Shiras, in *C., N. O. & T. P. R. Co.* v. *Int. Com. Com.* (162 U. S., 184), and by Mr. Justice Brewer in the Freight Bureau cases (167 U. S., 479).

In *Southern Pacific Co.* v. *Board of Railroad Commissioners of California* (78 Fed. Rep., 236) Mr. Justice McKenna, then circuit judge, said with reference to economic laws governing transportation (p. 256): "It is certain that they are not the same for a road which has no competitors as for a road which has competitors, not the same for *monopoly* as for *competition*."

XII.

If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation of these roads now under the agreement. The public is not interested in consolidation except as it affects competition. The constitution and laws of many States prohibit the consolidation of railroads, but only of *competing* railroads. Lines which do not compete may consolidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the antipooling section of the interstate

commerce act. The pooling of freights and the division of earnings is not bad in itself. It is bad, because used to stifle competition. Equally bad is the Joint Traffic Agreement before the court, which operates as effectively as any pooling arrangement ever devised. The people have not stopped to inquire whether consolidation would result of necessity in unreasonable rates; neither have they stopped to enquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade. Let me direct the court to its language, expressed through Mr. Justice BROWN, in *Pearsall* v. *Great Northern Rwy.* (161 U. S., 646, 676):

> Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least, there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

> While, in particular cases, two railways by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

Also the language of the court by the same justice in the succeeding case of *Louisville and Nashville R. R.* v. *Kentucky* (161 U. S., 677, 698):

> This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States—a policy which has not only found a place in the statute law of such States as apprehended evil effects from such consolidations, but has been declared by the courts

to be necessary to protect the public from the establishment of monopolies. Indeed, the unanimity with which the States have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible.

The railroads say that if they are not permitted to prevent competition they will compete and in doing so violate the interstate commerce law; that they should be permitted to combine for the purpose of preventing violations of law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for law based solely on self-interest is delusive and evanescent.

XIII.

An attempt is made to distinguish this case from the Trans-Missouri Case by saying that here The Association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies; while in the Trans-Missouri Case The Association was given power to fix rates.

But in the Trans-Missouri agreement The Association was only given power to fix reasonable rates, and the fact that the rates fixed by The Association during its existence were fair and reasonable was admitted, the denials and allegations of the answer which appear in the statement of the case (166 U. S., 303) being as follows:

> They denied the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they denied any intent to unjustly increase rates, and denied that the agreement destroyed, prevented, or illegally limited or influenced competition; they denied that arbitrary rates were fixed or charged, or that rates had been increased, or that the effect of free competition had been counteracted; they denied any purpose in the formation of the association to monopolize trade, traffic, and commerce between the States and Territories within the region mentioned in the bill; and they denied that the agreement was in any respect the illegal result of any unlawful confederation or conspiracy. The defendants alleged that the proper object of the association was to establish reasonable rates, rules, and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the Interstate Commerce Commission, as required by section 6 of the act of February 4, 1887.
>
> They also alleged that it was not the purpose of The Association to prevent the members from reducing rates or changing the rules and regulations fixed by The Association; that by the terms of the agreement each member might do so, the preliminary requirement being that the proposed change should be voted upon at a meeting of The Association, after which, if the proposal was not agreed to, the line

making the proposal could make such reduced rate, notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule, or regulation by all lines interested and an interchange of views on the effect of such reduction, and that reductions of rates had been made in numerous instances through said process by The Association.

They admitted that the agreement took effect April 1, 1889, and that it had remained in operation since, and that the rates, rules, and regulations fixed and established from time to time under said agreement had been put into effect and maintained in conformity to law; and it was denied that by reason of the agreement, or under duress of fines and penalties, or otherwise, the defendants had refused to establish and maintain just and reasonable rates; and it was alleged that the object of The Association at all time had been and was to establish all rates, rules, and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They denied that shippers or the public were in any way oppressed or injured by reason of the rates fixed by The Association, but, on the contrary, they alleged that the agreement and The Association established under it had been beneficial to the patrons of the railway lines composing The Association and the public at large. These, in substance, were the allegations in the various answers.

There is no less power in the Joint Traffic Association than in the Trans-Missouri, indeed, more power with respect to rates, and it is with the power alone that the court is concerned, not how the power has been or may be exercised.

In the Trans-Missouri Case, The Association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic Agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve authority to keep them up after progress and invention should render them excessive and unreasonable. But in point of fact, as pointed out, the Joint Traffic Agreement vests in The Association, through The Managers, with appeal to the board of control, the authority to change rates. (Art. 5, sec. 5, Rec., p. 26; art. 7, sec. 2, Rec., p. 28.) This authority is more coercive than that conferred by the Trans-Missouri agreement.

Under the Trans-Missouri agreement five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting The Association voted on all changes proposed. All parties were bound by the decision of The Association "unless then and there the parties shall give The Association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of The Association. * * * Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then The Association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect upon the same day." Moreover, each member of the Trans-Missouri Association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving

the chairman notice of its action, so the good faith of the transaction might be passed upon by The Association at its next meeting. (Art. 2, secs. 4, 5, 6. Brief, pp. 36, 37.)

Thus, under the Trans-Missouri agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice, make an independent rate, notwithstanding the action of The Association. But under the Joint-Traffic agreement no company can deviate from the rates as fixed by The Managers, except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with The Managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision (art. 7, sec. 2, close):

> The Managers, upon receipt of such notice, shall act promptly upon the same for the protection of the parties hereto.

Mr. Carter, in his argument, explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by The Association, through its Managers, was required in order that The Association might have time to determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of The Association protected.

XIV.

It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give it to a poor road in order to do for it what the public along its line ought to do.

XV.

The provisions of the interstate commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without suppressing competition. The tenth article of the Joint Traffic Agreement (Brief, p. 42) provides that "The Managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rates, fares, and rules *established under this agreement*," and it is contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the third section of the interstate commerce act shows that the mischief suggested is fully provided for in its concluding paragraph, which

provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, "and shall not discriminate in their rates and charges between such connecting lines."

XVI.

It is insisted that if Congress had intended the antitrust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it would have used the language "every contract in *any* restraint of trade," etc., "is hereby declared to be illegal."

It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in any restraint of trade," and much better language. With due respect to the learned counsel, it might be suggested that if his criticism of the language used be a valid one, why may not the next commentator on this section forcefully insist that Congress should have said "every contract in *any and every* restraint of trade is hereby declared to be illegal?"

XVII.

The reply to Mr. Phelps's attack upon the constitutionality of the antitrust law as construed by this court in the Trans-Missouri Case, is to be found in the argument of Mr. Carter that railways are public highways, and in the furnishing of public transportation perform in a sense a governmental function. The right of the Government

to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The States regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn* v. *Illinois* applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the fifth section of the interstate commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling, or the combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

XVIII.

As to the remedy in the case of an unreasonably low rate.

Judge Cooley, in a well-considered opinion In re C., St. P. & K. C. Rwy. Co. (2 I. C. C., 231), approved by

this court in Interstate Commerce Commission *v.* Railway Company (167 U. S., 511), held that under the interstate commerce law the Commission has no power to determine that a rate is unreasonably low and to order the carrier to refrain from charging such rate on such ground, saying:

> But every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public history nothing can be more notorious than that the act to regulate commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for their service, should have the benefits which the law had undertaken to give, but of which, in very many cases, it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other.
>
> The act does, indeed, require them to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines; but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public

be wronged by arbitrary conduct or by favoritism or be subjected to extortion. It is to this end that the act declares that all charges made by the carriers it regulates shall be reasonable and just, and the purpose of the declaration is to establish the rule that the charges shall not be extortionate.

If such was the primary purpose of the statute, as unquestionably it was, then the proper meaning of the terms "just and reasonable" as employed in it are apparent. They were employed to establish a maximum limitation for the protection of the public; not a minimum limitation for the protection of reckless carriers against their own action. That a minimum limitation was not in the mind of Congress we may easily satisfy ourselves by considering what would have been the probable fate of any distinct proposition to confer upon the Commission the power which it is now urged to assume. There is not the least reason to suppose that any such proposition would have been seriously entertained in Congress or that it could have received any considerable support. It would, on the other hand, in all probability have been promptly rejected as wholly unnecessary for the protection of those who had complete powers of protection in their own hands, and as being little short of impertinent intermeddling.

If such would have been the fate of the proposition expressed in plain terms, then the conclusion is unavoidable that the general terms made use of in the statute do not confer the power the proposition would involve. We can not as a matter of construction deduce from the general terms of a statute a legislative intent which there is no reason to suppose existed in fact, but which on the other hand the circumstances all tend to show was not

suggested when the law was under consideration, and if it had been suggested would have been received with no favor.

XIX.

As to the remedy in the case of an unreasonably high rate.

The common law requires that rates shall be reasonable and fair. So does the interstate commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The Commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive, he gets so much less for his grain or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the interstate commerce act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the interstate commerce law.

In *Van Patten* v. *C. M. & St. P. Ry. Co.*, 81 Fed. Rep., 545, the circuit court of the United States for the northern district of Iowa (Judge Shiras) held that the standard of reasonableness fixed by the interstate commerce law is the published rate, and that it was a good defense, in an action for damages for alleged extortionate charges, to show that the charges made were in accordance with the rates fixed in the schedule filed with the Commission. In showing the impossibility of a judicial determination of the question whether, under modern conditions, a charge for transportation was or was not reasonable, Judge Shiras says (p. 552):

> How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard, already recognized and established, is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping, and operating the line of railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges, and the proper proportionate share which the particular shipment should bear.

If these general lines of inquiry are not available as guides for the jury in reaching a solution of the question, can recourse be had to any other standard of charges than that which may be likened to the market rate, and which is the result of free competition among those engaged in the business of common carriers? If it be the fact that as the result of free competition among carriers certain rates have been established for given services, what better guide could be given to the jury, when they are called upon to determine whether a rate exacted by a carrier from a shipper is or is not reasonable, than the rate adopted by those engaged in the business, and subject to the effects of free competition?

As I construe the act, this standard or guide is provided by the act in question. The statute is based upon the principle, which is the controlling element in regulating prices, values, and rates in the general commercial and manufacturing business of the country—self-interest controlled by free competition. When the act was adopted Congress well knew that every railway line was using and would continue to use, its utmost endeavors to secure as large a share of the transportation business within its reach as it was possible for it to do. The great complaint was that each railway, by means of secret rebates or other like devices, was endeavoring to outstrip its rivals in securing business. The theory of the act is that, if competition is left free at all points where two or more lines come into competition, there will be found established reasonable rates.

If, in scheduling its rates as required by the act, a carrier should increase the rate beyond a reasonable limit, its competitors would speedily capture the business at the competitive points, and of necessity, and under the spur of self-interest, the carrier

would be compelled to reduce the rate to one that was reasonable. Hence the act forbids pooling and all combinations having for their purpose the establishment of rates by agreements between competing carriers. Having thus provided for securing reasonable rates at competing points, a basis is found for the establishment of like reasonable rates at all intermediate places where direct competition does not exist, by the adoption of the clause forbidding a greater charge, under like circumstances, for a shorter than a longer haul, and by the liability of the carrier to damages if the schedule adopted and posted shows that a rate out of proportion, and therefore unreasonable, has been fixed for any of the points named in the schedule.

XX.

Not for the purpose of showing that the agreement is of necessity a pooling contract, but in order to show that the pooling of freights may be carried on under it, and, at any rate, all the objectionable features of a pooling contract are present in this agreement, with equally injurious tendencies and possibilities, I print as an appendix hereto an extract from the brief of Mr. Wallace Macfarlane, United States attorney, in the circuit court of appeals in this case.

XXI.

A printed stipulation was filed, signed by Mr. Carter, as counsel for the Joint Traffic Association. No question as to the jurisdictional amount involved has been made by counsel for the appellees either in the briefs or on oral argument. I have in my possession stipulations,

similar to that filed and printed, which are signed by the solicitors for all the appellees, and also affidavits showing that the amount involved in the case is far above the jurisdictional requirement. In order not to burden unnecessarily the files of the court these have not been filed, but will be should the court desire it.

XXII.

As the law stands, the Commission has no power to prescribe or enforce rates. Competition secures reasonableness; the law enforces uniformity. In *Interstate Commerce Commission* v. *Railway Company*, 167 U. S., 479, this court, speaking by Mr. Justice Brewer, held that if Congress had intended to give the Commission power over rates it would have done so in unmistakable language. So, too, when Congress sees fit to take the railroads out of the operation of the natural law of trade it will do so in plain terms, and for independent competition will substitute Governmental regulation.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX.

EXTRACT FROM ARGUMENT OF MR. WALLACE MACFARLANE ON THE POOLING SECTION.

The interstate commerce act was the result of a special investigation carried on by a special committee of the Senate of the United States, known as the Cullom Committee. This committee took a large amount of testimony and made an elaborate report. Its report is published in one volume as Senate Report, first session Forty-ninth Congress, Volume II, and the testimony in a separate volume, entitled Senate Report, first session Forty-ninth Congress, Volume III. To this testimony and report the court may refer as an authoritative source from which to derive a correct apprehension of what section 5 of the act finally passed means by the pooling of freights of different and competing railroads.

The history of the act and the debates in Congress upon the antipooling clause, as section 5 has been commonly termed, are also very instructive, as showing what it was that Congress meant to prohibit. The writings of authoritative authors on the subject may also be consulted.

It will appear that at the time of the passage of the "act to regulate commerce" two classes of pooling arrangements were well known and in common use.

(1) The agreement to "divide the traffic."

(2) The agreement to "divide the earnings."

The first was commonly called a traffic or freight pool; the second a money pool (Hadley on Railroad Transportation, pp. 74–76, 91–97).

The traffic pool is designated in the "act to regulate commerce" (sec. 5) as "pooling of freights;" the money pool as "division of the aggregate or net proceeds of the earnings or any portion thereof."

The essential feature in an agreement for the "pooling of freights" is an arrangement for the apportionment of the competitive traffic within the scope of the agreement in shares arrived at without competition. These shares may be agreed percentages fixed beforehand, or equitable proportions determined by a board of managers or arbitrators, or in any manner satisfactory to the parties.

Such arrangements are made a feature of agreements to maintain rates among competing carriers in order to take away the temptation from the weaker and inferior roads to get business by cutting the rates agreed upon by their superior competitors, and to keep such roads in the combination. If a road will only get its agreed percentage or equitable share, no matter how much of the traffic it may in fact carry, and will have to account for the excess either by a payment of money or by carrying less than its share during the next settling period, there is no motive to cut rates in order to get more business.

Pooling is described by the Hon. Thomas M. Cooley, in an article published in the Railway Review on January 8, 1887. I quote from it and other articles on the same subject published in a volume entitled Compendium of Transportation Theories, published in 1893 by

Kensington Publishing Company, of Washington, of which a copy is submitted with this brief. Many of these articles are written from the extreme railroad point of view. I quote them, however, to show what a "pooling of freight" is. The title of Judge Cooley's article is "Popular and legal view of traffic pooling." What Judge Cooley says on this subject has great authority. Prior to the passage of the interstate commerce act, he had been one of the board of arbitrators under one of the trunk-line agreements, known as the joint executive committee. After the passage of the interstate commerce act, he became chairman of the commission. A long judicial experience also had made him very familiar with the laws relating to railroads. In the article referred to, under the heading "*What they are*," Judge Cooley defines pools. He recognizes that there are two classes of pools, one where the basis is an equal division of profits, the other where the basis is a division of business between the contracting parties. At page 230 of the volume above mentioned he says:

> In this country the method of pooling seems to be for the several contracting parties to create some common authority upon which will be conferred the power to establish and change rates for the transportation of property within a certain territory or over a certain line, and also to apportion the business between them. The apportionment will be made upon a consideration of what the companies severally would be likely to obtain under the operation of free competition, and it will be changed from time to time if found to be relatively unjust. The feature of arbitration upon

> controversies arising between the contracting parties will also be prominent in the arrangement. The contract will be made for a definite term of years, with liberty to dissatisfied parties to withdraw upon reasonable notice, and it will be likely to provide that a commission acting for all shall give direction to shipments when this shall be necessary to give each road its allotted share. But as shippers will have a legal right to have their property transported by a line of their own selection, it may well happen that some roads will carry more and some less than their proportion, and provision will therefore be necessary for a periodical adjustment of balances and for the payment of moneys from one to another as may be needful upon such allowance for the business done above the allotted share as shall be fixed upon as just. Perhaps clauses will be inserted in the contract which will have for their purpose to make it for the interest of shippers to send forward their property according to the directions of the commission, but compulsory power in this direction must practically be very limited.

Judge Cooley then states, as the purpose of pooling arrangements, as follows:

> The avowed purpose in pooling is to avoid ruinous competition between the several roads represented, and the unjust discrimination between shippers which is found invariably to attend such competition.

At page 238, under the heading "Sanctions for pooling contracts," he says:

> Penalties to be imposed by the association will be out of the question. They will not be paid voluntarily by parties who will not voluntarily observe their agreements, and they can not be col-

> leeted by law. No doubt, it might be made part of the pooling arrangement that a fund should be provided by proportionate contributions, and that from the sum paid in by any member a penalty assessed against it should be paid; but it would be easy for such member, if dissatisfied, to enjoin the payment, or in case of its failure to take steps for that purpose, for any of its stockholders to do so. Penalties, therefore, can not constitute a reliance.
>
> The principal danger to be guarded against is the cutting of rates. In the unregulated and unreasoning strife between railroad companies this cutting is not only carried on to an extent that is ruinous to the companies themselves, but it becomes a disturbing factor in all commerce; and it is perfectly correct for the railroad companies to say, as they do when defending pooling, that unjust discriminations are a necessary result.

This article was written by Judge Cooley in January, 1887, a month before the interstate commerce act was passed. Obviously, as he recognizes (p. 237), pooling agreements do not always take the same form. All the details mentioned in the passages quoted may not appear in the same contract, but in all will be found provision for apportioning the traffic *without competition*.

On January 8, 1889, after he had been an Interstate Commerce Commissioner for two years, Judge Cooley delivered an address entitled "The interstate commerce act—pooling and combinations which affect its operation," published in the same volume at page 242. At page 247 of this address, he says:

> Let us see what pooling involves.
>
> It is desired to establish it, we will say, in trunk-line territory. There are some strong lines there,

and some very weak ones; there are short lines and long; there are direct roads for the business between leading points, and there are roads twice as long which, nevertheless, demand a share of the business. There are local roads which have fair claim to nothing but local business, but which are nevertheless capable of being made links of long but circuitous lines, and of thus becoming disturbers of rates for the whole territory. The problem, when pooling is proposed, is how to satisfy all the parties; *how to apportion the business so that all will be content and remain so.* And at the outset it must be understood that there is not business enough to make them all profitable, and inevitably some must have precarious existence."

At page 72, in an article entitled "The railroads as one system," Mr. Joseph Nimmo, jr., under the heading "The federation of the railroads," says:

But even as thus organized, railroad traffic associations exhibited a fatal infirmity. The reforms which they proposed were beneficent, but the spirit of the reckless and uncontrolled competition survived. * * * The root of the difficulty lay in the fight by each company for a larger share of the competitive traffic than any other company was willing to grant it. Hence was evolved out of the fierce interaction of forces the new law of self-restraint—*agreements as to the share of the competitive traffic which should be carried by each line.* * * * *The agreement as to the apportionment of traffic is the corrollary of the rate agreement.* The former is no more in restraint of competition than is the latter. Both restrain destructive competition, which run to disorder.

He then says (p. 77):

> It is unfortunate that, in giving the force of legality [the writer refers to the interstate commerce law] to so much which experience had proved to be just and beneficent, the legislator should have gone astray in regard to a clearly established law of the American railroad system which had been forced upon railroad managers by the logic of events. *I refer to the clearly established fact that the maintenance of rates must be based upon precedent agreements as to the share of the competitive traffic which shall be secured by each competitor.* The fifth section of the act forbids such agreements, and thereby forces the railroads to the violation of every beneficent provision of the statute.

In an article in the same volume, entitled "Amendment of interstate commerce law," published in June, 1893, written by Aldace F. Walker, a railroad manager of great experience and formerly an Interstate Commerce Commissioner, he says (p. 13):

> It is also becoming generally understood that making or "establishing" of railway rates, and the "maintaining" of those rates when so established, are two very different things; that both are absolute necessities to any scheme of governmental supervision; and that the pooling of freights or of earnings is the only practical way known in the history of the world, short of a common ownership, by which such an absolute maintenance of rates as is justly required by law for the prevention of unjust discrimination can be secured. In other words, it is seen at last *that the fair division of competitive traffic would be an aid and support to the regulative system.*

In an article in the same volume, page 136, Prof. Henry C. Adams, statistician of the Interstate Commerce Commission, under the heading "How may rates be maintained?" says:

> Pooling means the limitation of competition, or what amounts to the same thing, an agreement respecting the conditions under which competition shall take place.

In an article in the same volume entitled "The interstate commerce law," Mr. Charles Francis Adams, page 181, says:

> *The practice known as pooling, which the interstate commerce act inhibits, was merely a method through which the weaker railroad corporations were kept alive.* To prevent excessive and unequal competition, business was so divided that the less favored corporation had some share of traffic assigned to it. This practice the law put a stop to; and it further enacted that rates to competing points should not be less than rates to intermediate points.

After advocating the repeal of the antipooling clause of the interstate commerce law, Mr. Adams, at page 184, says:

> If the antipooling provisions of the act may not be wholly repealed, let them, at least, be so modified that contracts made among railroads, subject to the approval of the Interstate Commerce Commission, for the division of competitive traffic at reasonable rates, may be binding in law.

In an article in the same volume entitled "The necessity for railway compacts under governmental regulations,"

by Mr. James Peabody, editor of the Railway Review, the writer says at page 220:

> The word "pool," as applied to compacts by which the equitable distribution among carriers of common traffic is sought to be effected, is both inapt and inaccurate, especially as there is attaching to it a disreputable flavor growing out of its intimate association with gambling operations. * * * Pooling as applied to the carrying business *expresses an effort on the part of carriers to distribute common business in an intelligent and economical way instead of allowing it to seek, through the medium of rate wars, those channels which will pay the most for it.* * * * At the time the act to regulate commerce became effective it had come to include the fundamental principles of the act—to wit, the removal of discrimination as between shippers, and the maintenance of equal rates for similar and contemporaneous service.

And in summing up at page 221 the author says:

> Third. Traffic or pooling compacts which provide *for the equitable division of common traffic* are the only yet discovered means whereby the interests of all parties may be conserved.

In another article in the same volume, entitled "The apportionment of traffic among competing railroads," by Mr. Joseph Nimmo, jr. (p. 221), pools are defined as agreements for the division of competitive traffic for the maintenance of rates among competing railroads.

Mr. J. F. Hudson, in his book on The Railways and the Republic, defining pools, says at page 196:

> In general the term is applied to any combination between railways engaged in competitive traffic to maintain rates by suspending competition.

The author then defines the general characteristics of the two classes of pools, namely, traffic pools and money pools.

In his testimony before the Hepburn committee[1] in 1879, Mr. James H. Rutter, then general traffic manager of the New York Central and Hudson River Railroad Company, was asked the following question:

> Q. Explain what pool is, please?
>
> A. Dividing the business; each agreed to take a certain proportion of the traffic and take means to see that each one got its proportion. (Vol. 1, Report of Hepburn Com., p. 282.)

Mr. William H. Vanderbilt, then president of the New York Central and Hudson River Railroad Company, and Mr. H. J. Jewett, then president of the New York, Lake Erie and Western Railroad Company, wrote a joint letter to the Hepburn committee, and at page 55 of the same volume they take up the question of pooling. These gentlemen in this letter (p. 56) say:

> We go further than the address, and assert that pooling is a successful plan for preventing railroad wars and securing uniformity and permanency in rates.

At page 57 they say:

> If, then, the railroad companies agreed to pool the traffic at such competitive points and fix the rates on the principles above established, whose interests are damaged?

[1] NOTE.—This committee was appointed in 1879 by the legislature of the State of New York to investigate the railroad pools then existing. Its report throws much light on the subject of pooling.

In his book on railroad transportation Mr. Arthur Hadley, then commissioner of labor statistics of the State of Connecticut and an instructor in political science in Yale College, classifies pooling agreements as follows (p. 74):

> This agreement may take any one of four forms:
> 1. Agreement to maintain rates.
> 2. To divide the field.
> 3. To divide the traffic.
> 4. To divide the earnings.
> The last three are commonly known as pools.

Mr. Hadley then briefly discusses the characteristics of each form of agreement. Discussing the third form, namely, to divide traffic, he says, at page 75:

> But in the majority of cases this arrangement (to divide the field) is impracticable, and the rival concerns agree upon the proportion of business which each is to do. * * * Railroads agree to just what percentage of competitive traffic each road shall carry.

And again, at pages 91 to 97, the learned author discusses railroad pools in their relation to competition and combinations, and also discusses the history of pools in the United States.

In the testimony taken before the Cullom Committee much was said in respect to the nature of pooling agreements, and the testimony of the various witnesses can readily be referred to by means of the index under the heading, "Pooling agreements by railroads." In the first part of the committee's report there is an appendix, containing a good many statements from witnesses which were too late to be published with the testimony.

Nearly all these witnesses replied specifically to the seventh question of the committee, which called for expressions of opinion upon the nature and advisability of pooling contracts. At page 33 of Part II, Mr. William E. Rogers, one of the railroad commissioners of the State of New York, says:

> I am clearly of the opinion that there is no way to secure uniformity of rates over its railroads except by allowing them to determine among themselves the rates of freight they will charge; in other words, a pooling arrangement—subject, however, to official control.

Mr. Albert E. Fink, for years the commissioner of the trunk lines under their pooling arrangements, and himself the principal author of such arrangements in the United States, testified at length before Mr. Cullom's committee. His testimony will be found in Part II, pages 89 to 126. Mr. Fink's testimony shows quite clearly what the nature of a pooling agreement is. Mr. Fink shows that schedules of rates could be agreed upon between competing and connecting carriers without any reference to pools, but mere agreements to maintain rates were practically unenforceable. The pooling feature of such agreements was invented and introduced for the purpose of enforcing the agreement. At page 116 of Part II of the Cullom report Mr. Fink was asked the following question:

> Senator PLATT. Having got the tariff, would a pooling arrangement be necessary?
>
> Mr. FINK. No, it would not be necessary if you could strictly enforce the tariff by law, but it would be a great aid in enforcing the law. The only

object of the pooling agreement is to enforce the agreed and published tariffs. They have nothing to do with making the tariffs. Tariffs are established entirely without reference to pools. I have explained that they are regulated by other considerations. But once being established, the pooling system is adopted to maintain such agreed tariffs, and it is a more efficient method than any legislation that you can possibly devise, because it strikes at once at the very root of the evil by removing the motive for violating the published tariffs, the motive for paying rebates, and making secret commissions to shippers. The pooling agreements are intended to prevent the fights between railroad companies which render it impossible to maintain proper tariffs. * * * *By the pooling agreements the question of how much each road shall carry is determined by mutual agreement or arbitration, making the fighting unnecessary.*

His whole testimony on this subject is of interest and importance. In the appendix to part 1 of the Cullom report, containing the statements of a great many persons expert in railroad matters, will be found very valuable descriptions and definitions of pooling contracts. Special attention is called to the statement of Mr. John D. Kernan, then chairman of the New York railroad commission, at pages 17 to 21 of the appendix.

At page 213 of the appendix Mr. Charles E. Perkins, then president of the Chicago, Burlington and Quincy Railroad, defines pools as follows:

> A pooling contract is in effect a mere agreement between rival railroads that they will not permit their agents in the contest for business to cut rates unreasonably low.

(3) That the supposed evil which Congress intended to suppress by prohibiting "*pooling of freights*," was the familiar arrangement between competing carriers to apportion the competitive business in equitable shares in order to remove the chief motive for cutting rates, is evident from the debates in Congress on the bill.

March 17, 1886, Mr. Cullom reports the bill (S. 1532) to the Senate from the Senate Committee on Commerce (Congressional Record, Forty-ninth Congress, first session, vol. 17, part 3, p. 427).

Bill debated in the Senate (pp. 2427, 2477, 2907, part 4; pp. 3440, 3470 to 3478, 3511, 3552 to 3556, 3687, 3693, 3721 to 3728, 3824 to 3535, 3866 to 3879, 3921, 3975, 4007, 4178 to 4187, 4223 to 4240, 4306 to 4322, 4347 to 4362, part 5; pp. 4353 to 4370, 4396 to 4423).

Passed the Senate, May 12, 1886 (p. 4423).

Referred to House Committee (part 5, p. 4509).

May 22, 1886, Mr. Reagan, from the House Committee on Commerce, reported back the Senate bill to regulate commerce with an amendment in the nature of a substitute (p. 4809).

Committee report taken up in the House July 21, 1886 (part 7, p. 7276).

(At page 7279) Mr. Reagan, chairman of the House Committee, reports that the amendment proposed by the committee to the Senate bill was to strike out all after

the enacting clause and substitute the provisions of the House bill for it.

A bill substantially similar to the House bill had been passed in three different Congresses by large majorities.

After the House, during this session, was in a position to take up the bill reported from its committee, the Senate bill came to the House; the committee thereupon took the Senate bill referred to them and acted upon it by making the report now under consideration.

At page 7280 Mr. Reagan explains the difference between the two measures. The Senate bill differs from the House bill in that its provisions relate to the transportation of passengers as well as freight, and transportation by water as well as by land. As far as pooling is concerned, as appears from Mr. Reagan's statements (p. 7281), the Senate bill had provided by section 19:

> The said commission shall specifically inquire into the methods of railroad management or combination known as pooling, and shall report to Congress what, if any, legislation is advisable or expedient upon that subject.

And Mr. Reagan said (p. 7281):

> The second section of the House bill provides, among other things, that "it shall not be lawful for any person or persons carrying property as aforesaid to enter into any contract, agreement, or combination for the pooling of freights or to pool the freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion of them, and in case of any agreement for the pooling of freights or earnings as aforesaid

each day of its continuance shall be deemed a separate offense.

This is a clear, specific provision for the prevention of pooling. * * * The House bill provides for action. The Senate bill proposes inquiry.

Mr. Reagan continued (page 7281):

> Pooling by railroad is prohibited by the constitution of the States of Arkansas, Michigan, Missouri, Nebraska, Pennsylvania, and Ohio. It is prohibited by the laws of other States. Pooling is a violation of the common law, because it is a restraint upon the freedom of trade and a conspiracy against the public welfare. And this doctrine is maintained in the following American cases: 8 Mass., 223; 1 Pickering, 450; 35 Pickering, 188; 19 Pickering, 51; 35 Ohio State Reports, 672; 68 Pennsylvania State, 173; 5 Denio, 434; 4 Denio, 349.

The minority of the House committee report against the committee bill (p. 7285), stating that they do not believe that the absolute prohibition of pooling is necessary: "There should be legislation imposing restrictive provisions, for the shipper should not be placed at a disadvantage, or competition in freight charges lessened so that transporters only should be benefited." The issue as to the prohibition of pools was thus squarely raised.

Mr. Reagan, further discussing the question of pools (p. 7298), says:

> Another thing: The House bill prohibits the pooling of freights and prohibits the dividing of the proceeds, or any part of the proceeds, coming from the freights. The gentlemen from Iowa (Mr. Hepburn) this evening made the criticism that

this bill only prohibited pooling freights, and did not prohibit pooling money. The gentleman had read the bill to little purpose. It prohibits the pooling of freight and the dividing of the product of the pool. These pooling arrangements enable the making of one vast monopoly from several small monopolies, and would give to the railroads control of the transportation and commerce and wealth of the country, and ultimately the control of its polities and its liberties. Pooling, in principle, has been forbidden by the common law for six hundred years and more; it is forbidden by the constitutions of many States, and by the laws of many others; forbidden by the whole line of judicial decisions running through many years, and I referred to a number of such decisions to-day. Now, the House bill proposes to do something to protect the people. The Senate bill proposes to inquire whether something is necessary to be done. These are the main features of difference between the bills.

July 30, 1886, the House adopts the committee's substitute for the Senate bill and passes the same—192 yeas, 41 nays (vol. 17, part 8, pp. 7755–6).

A conference committee from the House confer with the Senate committee (p. 7818). The Senate receives the bill as amended from the House and appoints a committee of conference.

December 15, 1886, the conference committee of the two Houses, composed of Messrs. Cullom and Harris on behalf the Senate, and Messrs. Reagan, Crisp, and Weaver on behalf of the House, report a bill to the Senate, being the one which was passed and became what is known as the interstate commerce act (Congressional Record, Forty-ninth Congress, second session, vol. 18, part 1, p. 169).

Senator Cullom, explaining to the Senate the Conference Committee measure (p. 170), says:

> Section 19 (of the Senate measure), requiring an immediate investigation by the commission of the necessity of legislation upon the subject of pooling, has been stricken out, and section 5 of the committee bill contains the provision of the House bill prohibiting pooling, with some modifications of the language."

Senator Platt, the sixth member of the conference committee, opposed the conference bill, particularly the antipooling provision (pp. 170, 171).

The report of the conference committee is given on pages 171 to 173, and from it it appears that the whole measure has been made applicable to passenger as well as freight traffic, and so far as the pooling provisions are concerned, section 19 of the Senate bill has been stricken out, and section 2 of the House bill was slightly modified, and as such became section 5 of the new measure, and reads as follows (p. 172):

> SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

The measure was discussed at a number of different times and at length in the Senate, both *pro* and *con*. In

a speech against the bill made by Senator Platt (vol. 18, p. 361), he said:

> "*What is a pool? What is a pooling contract? It is simply an agreement between competing railroads to apportion the competitive business; that and nothing more. I repeat it—it is an agreement between competing railroads to apportion the competitive business.* It does not touch the local business; it does not reach it; it has no reference to it. The local business is left to each individual company. It is noncompetitive." Pooling has nothing to do *per se* with making rates.

The report of the Conference Committee was adopted by the House January 21, 1887, by a vote of 219 to 41 (vol. 18, part 1, p. 881), and the bill passed. It then went to the President, was signed, and became the interstate commerce act, to be found in 1 Supplement Revised Statutes, pages 529 and 530.

It sufficiently appears, therefore, that the phrase "*pooling of freights*," in section 5 of the "Act to regulate commerce," means an agreement between competing carriers to apportion traffic between them in shares determined without competition in order to prevent reduction of rates by competition for business.

(4) *Pooling contracts have been almost invariably held to be illegal in American courts.*

Pooling contracts have frequently been held illegal as between the parties thereto. (*Chicago, Milw. and St. P. R. R. Co.* v. *The Wabash, &c., Ry. Co.*, 61 Fed. Rep., 993, C. C. A. Eighth Circuit, May 7, 1894; *C. C. C. & G. R. R. Co.* v. *Closser*, 126 Indiana, 348; *Gulf,*

Colorado and Santa Fe R. R. Co. v. *Texas*, 72 Texas, 404; *Texas Standard Oil Co.* v. *Adoue*, 83 Texas, 650; *Texas and Pacific Rw. Co.* v. *The Southern Pacific Rw. Co.*, 41 Louisiana Annual, p. 970; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S., 396; *Anderson* v. *Tett*, 89 Kentucky, 375; *Emery* v. *Ohio Candle Co.*, 47 Ohio St., 320; *Morrill* v. *B. & M. R. R. Co.*, 55 N. H., 531; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St., 173; *Stanton* v. *Allan*, 5 Denio, 434; *Denver, &c., R. R. Co.* v. *Atchison R. R. Co.*, 15 F. R., 651, U. S. C. C. Dist. of Colorado; *Central Trust Co. of New York* v. *The Ohio Central R. R. Co.*, U. S. C. C. N. D. Ohio, 23 Amer. and Eng. R. R. Cases, vol. 23, p. 666).

Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE UNITED STATES

vs.

THE JOINT TRAFFIC ASSOCIATION *et al.*

Brief for the Joint Traffic Association.

This is an appeal from the decree of the Circuit Court of Appeal for the Second Circuit affirming a decree of the Circuit Court of that Circuit dismissing the bill.

The object of the bill was to procure an adjudication that a certain agreement entered into between a large number of railroad companies forming most, but not all, of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast for the purpose of forming an Association for the better regulation of a certain part of the traffic of those lines and systems, was illegal and void, and enjoining its execution.

For many years the business of these lines, like railroad business elsewhere, had been regulated to a greater or less degree by the voluntary co-operation

of the companies engaged in it; but such co-operation had been greatly hindered and rendered ineffective by reason of the tendency of the competition between them to run into those forms of deadly strife, commonly known as *rate wars*. These struggles made any such thing as uniformity and equality in rates wholly impossible, and resulted in other mischiefs alike detrimental to the railroads and to the public.

Moved by these considerations, Congress in 1887, enacted the Inter-state Commerce law, the main design of which was to abolish discrimination in rates and secure a greater decree of uniformity, and to that end it required all railroads engaged in inter-state transportation *to file with the Commission and publish* schedules of their respective rates, and forbade the carriage of goods for any greater or less compensation than that specified in the published rates.

It could not have been expected that this requirement to file and publish rates, which could not be departed from except by publishing new rates in the manner provided in the act, would be complied with without an attempt, at least, at concert of action in framing the schedules. Without this, every variety of charge for similar services would have been exhibited, and any road which found itself outbidden by another would be obliged, in order to retain its business, to frame new schedules, giving as low rates as any of its competitors, and perhaps lower ones; and thus a rapid and ceaseless changing of schedules would follow.

Accordingly, even before the passage of the law, the rival lines engaged in an effort to agree upon the schedules which each should file and had reached such agreement in time to file and publish them in compliance with the provisions of the law.

A difficulty, however, soon arose in consequence of the fact that the lines would not adhere to the rates fixed upon. The agreement, not being formal and solemn, could not be enforced; and

as soon as any line found it was losing business, it felt obliged to endeavor to recover it by decreasing its rates; but, as the law required the proposed change to be published beforehand, little would be effected by the change, inasmuch as the publication would at once notify rivals of the contemplated step and lead to a corresponding decrease by them.

The temptation was irresistible to get new business by lower rates without publishing them, and as soon as such a course was pursued by one party, its rivals would necessarily be driven to follow it. The risk of detection and punishment was insufficent to prevent these practices, but quite sufficient to induce all forms of concealment and dishonest artifices.

The mischiefs thus arising were intolerable, and compelled from time to time various efforts for relief. The agreement in question was the last result of these efforts, and was believed to promise great benefits, and to make it in the interest of all to comply with the Inter-state Commerce Act, and to detect, expose and punish any who, from a mistaken view of interest, should violate it. It made no effort to prevent competition; but sought to devise a scheme which would compel any competition to be fair, lawful and open, and enable any rival to meet it without violating any law.

Unfortunately, large corporations are viewed with a jealousy which does not confine itself at all times within the bounds of reason, and this sentiment creates hostilities to which it is but natural, at least, that public officials should yield. Transactions which in the absence of political prejudice and passion would pass unnoticed by those not immediately affected by them, are subjected to hostile scrutiny, and it was not unnatural that such an agreement would raise a clamor that it was designed to raise rates. There never was a pretence, however, that under the agreement there was the slightest exaction of unreasonable charges.

On the contrary, the schedules of rates agreed upon and filed with the Inter-state Commerce Commission had never been objected to by that body and were notoriously lower than those imposed for similar services in any other part of the world. But the assertion was that excessive rates *might*, at some time, be exacted and maintained under such agreements, and this was deemed a sufficient justification for attacking this one. At all events, it seems to have been thought that such agreements should not be allowed until the legality of them had been authoritatively sanctioned by the judicial tribunals.

While, upon the general principles of equity jurisdiction, no one would claim that a bill filed by the United States to declare an agreement void merely on the ground that it was illegal could be maintained, it seems to have been supposed that the provisions of the Inter-state Commerce Act, and of the act commonly called the Anti-Trust Act authorizing an appeal to this jurisdiction afforded grounds upon which this agreement could be directly attacked in a court of equity in the name of the United States on the mere allegation of *illegality*.

Accordingly the District Attorney for the United States, for the Southern District of New York, filed this bill in the Circuit Court for the Second Circuit against the Association and the several companies which had united in the agreement, praying for a judgment that the agreement was "unlawful, null and void," and that the defendants be enjoined from continuing in the combination or association established by the said agreement and from acting, or in any way operating their roads, thereunder.

The allegations upon which this relief was sought were that the agreement was entered into by the defendants "intending to restrain trade and commerce "among the several States and attempting to monopo-"lize such trade and commerce, and intending to re-"strain and prevent competition among the said rail-

"roads in respect to all the inter-state trade and "commerce hereinafter more particularly described." (Record, fol. 17). The subordinate allegations supposed to justify the one above alluded to respecting intent, were "that by the said agreement the said "companies surrendered to the said Association, subject "to certain exceptions hereinafter stated, all the com- "petitive traffic passing from, to, or through the western "termini" of certain trunk lines, which were described, "and such other points as might thereafter be desig- "nated as such termini by the Board of Managers con- "stituted by said agreement" (Record, fol. 20); also, that by the said agreement "the said railroad "companies, parties thereto, in order to terminate all "competition among themselves for the freight and "passenger traffic aforesaid, unlawfully agreed to sur- "render the control of such traffic to the Board of "Managers created by the terms of the said agreement "or articles of organization as aforesaid" (Record, fol. 23); also that "in and by the said agreement the "said companies, unlawfully and in restraint of trade "and commerce among the several States, agreed that "the said Board of Managers, to whom full control over "the aforesaid competitive traffic was surrendered and "entrusted by the terms of said agreement, should "divide the said competitive traffic among the railroad "companies, parties to said agreement, in such propor- "tions as they, the said Board of Managers, should de- "termine, thereby unlawfully combining a large part of "the freight business of the aforesaid several competing "railroads and railroad systems, restraining and pre- "venting competition among the said railroads in re- "spect to all such competitive traffic, and thereby un- "lawfully restraining trade and commerce among the "several States and territories of the United States, "and unlawfully attempting to monopolize a part of "such inter-state trade and commerce" (Record, fols. 26–27); also, "that the said several railroads and "systems, parties to said contract, agreement or articles

"of organization, in and by the said agreement or "articles of organization, and in furtherance of their "aforesaid unlawful purpose to restrain interstate trade "and commerce by unlawfully pooling or combining "the large and important part thereof hereinbefore "described, and for which, prior to the date of said "agreement, the said railroads, or many of them, were "actively and independently competing, to the great "advantage of the public, and of the United States, "both in facilities and in rates, fares and charges, un-"lawfully agreed that the Board of Managers created "by said agreement and thereby charged with the exe-"cution thereof, should have power to establish the "rates, fares and charges for carrying such traffic, both "freight and passenger; * * * * thereby unlawfully, "and in restraint of inter-state trade and commerce "contracting, agreeing and combining among them-"selves for the division between them of a portion of "the earnings of the said several railroad companies, "parties to the said agreement or articles of organi-"zation" (Record, fols. 27–29).

Most of the defendants adopted the answer of the Joint Traffic Association, which appears at page 62 of the Record. This answer admitted the making of the contract, but denied that it was "an unlawful "contract in any of its provisions, or that it is or was "intended to be a contract, agreement, combination or "conspiracy to restrain trade or commerce among the "several States, or was or is an attempt to monopolize, "or does or will operate to monopolize, such trade or "commerce, or is or was intended to restrain or prevent "legitimate competition among such railroads in re-"spect to any inter-state trade or commerce" (Record, fol. 194). It further denied "each and every allega-"tion of the bill of complaint imputing to the said "agreement or to the parties thereto any other agree-"ment or intent than such as appears on the face there-"of." The answer further denied that by the said agreement or otherwise, "the said companies or any

"or either of them surrendered to the said Association "any traffic whatever" (Record, fol. 198).

It may be said, indeed, without further citation, that the answer denied every allegation of unlawful act, or unlawful intent, unless the making of the agreement itself was an unlawful act.

After denying all allegations of unlawful acts or intents other than the mere making of the agreement, the answer proceeds to set forth with minuteness the condition of the railroad traffic to which the agreement was applicable at the time when it was made; points out the successive steps by which that traffic had reached the condition in which it then was; shows that its beneficial features had been reached by conference, agreement and community of arrangement among numerous independent roads, and that such conference and agreement were necessary to the harmonious operation of the different railroad companies, and necessary, as well to the public as to the railroads themselves. It sets forth the enactment of the Inter-state Commerce Act and refers to the important requirements of that Act, and shows that compliance with such requirements involved concerted agreement and harmonious action between the different railroad companies. It further shows that after the passage of the Inter-state Commerce Act, secret, illegitimate and unlawful competition became very prevalent and very mischievous, and in very many instances led to great demoralization in the business of railway transportation, quite as injurious to the public as to the railroads themselves. It points out that the results of such competition were instability in rates, unlawful discriminations and rate wars, the necessary effect of which would be, if prosecuted to the end, to crush out the weaker parties and thereby deprive the public of important and valuable facilites, or throw the control of the weaker lines into the hands of the stronger ones. The substance of the answer in this respect is that the agreement

was designed, not in any manner to destroy legitimate competition, but to destroy irregular and unlawful competition, and to enable the transportation business of the country to be done in accordance with the requirements of the Inter-state Commerce Act.

The complainants set the cause down for hearing upon bill and answer, thereby admitting the truth of all averments of the answer so far as the same were well pleaded. It will not be contended by the respondents that this condition of the pleadings can have the effect to relieve the agreement from the charge of illegality, if it be, in and of itself, necessarily illegal; but, on the other hand, all must agree that unless the agreement is necessarily, and upon its face, illegal, the pleadings do effectually relieve it from any charge of illegality.

The Circuit Court after a full hearing dismissed the bill, and its decree was affirmed by the Court of Appeal. The present appeal is from the decree of affirmance.

The agreement has been assailed upon two grounds; *first*, that it is a violation of the Act of July 2nd, 1890, commonly called the Anti-Trust Act; *second*, that it is a violation of Section 5 of the Inter-state Commerce Law, which prohibits what is commonly called *pooling*. It is to the questions thus raised that the argument of this brief will be directed.

It may seem, at first, that we are aiming to persuade the Court to reconsider its reasonings and determinations in the recent case of the United States *v.* The Trans-Missouri Freight Association. Such an impression would be unfortunate and tend to deprive the respondents of that fair consideration to which they are entitled.

They might ask for such reconsideration if they thought it to be necessary, and could support the request by reasons well deserving attention; but it would be their duty to avow their purpose and make an open request.

It may be that one of the questions now sought to be presented might have been made in that case and a decision of if obtained; but it is quite certain, as it appears to the undersigned, that the question was not raised. This, however, is so important that it should not be assumed, but clearly shown.

The opinion pronounced by Mr. Justice Peckham, after having considered and rejected the argument that the Anti-Trust Act did not apply to railway companies, passes to the vital question whether the agreement in that case was one condemned by the act, and most clearly and explicitly states what it assumed to be the precise nature of the question, in these words:

"SECOND. The next question to be discussed is as "to what is the true construction of the statute, as- "suming that it applies to common carriers by rail- "roads. What is the meaning of the language as "used in the statute, that every contract, combination "in the form of trust or otherwise, or conspiracy in "restraint of trade or commerce among the several "States or with foreign nations, is hereby declared to "be illegal? Is it confined to a contract or combina- "tion which is only in *unreasonable* restraint of trade "or commerce, or does it include, what the language "of the act plainly and in terms covers, *all* contracts "of that nature?" (The italics are ours)

The opinion proceeds to briefly deal with the suggestion that the title of the act is indicative of a purpose to deal only with contracts unlawful at common law, and then states very clearly the main position taken by the defendants in order to show that the contract was not condemned by the act, namely, that the act "only meant to declare illegal any such which is *unreasonable* restraint of trade." It says:

"It is now with much amplification of argument ur- "ged that the statute, in declaring illegal every com- "bination in the form of trust or otherwise, or con-

" spiracy in restraint of trade or commerce, does not " mean what the language used therein plainly im- " ports, but that it only means to declare illegal any " such contract which is in *unreasonable* restraint of " trade, while leaving all others unaffected by the " provisions of the act; that the common law mean- " ing of the term contract in restraint of trade in- " cludes only such contracts as are in *unreasonable* " restraint of trade, and when that term is used in the " Federal statute it is not intended to include all con- " tracts in restraint of trade, but only those which are " in unreasonable restraint thereof."

The opinion then immediately passes to its conclusion adverse to this contention, saying that

"By the simple use of the term contract in restraint " of trade, all contracts of that nature, whether valid " or otherwise, will be included, and not alone that " kind of contract which was invalid and unenforceable " as being in unreasonable restraint of trade When, " therefore, the body of an act pronounces as illegal " every contract or combination in restraint of trade " or commerce among the several States, &c , the plain " and ordinary meaning of such language is not limited " to that kind of contract alone which is in unreason- " able restraint of trade, but all contracts are included " in such language, and no exception or limitation can " be added without placing in the act that which has " been omitted by Congress."

The learned Judge then alludes to the opinions in the courts below holding the contracts valid, and points out the method of reasoning adopted by those courts, describing it thus:

" Proceeding, however, upon the theory that the " statute did not mean what its plain language im- " ported, and that it intended in its prohibition to " denounce as illegal only those contracts which were

" in unreasonable restraint of trade, the courts below " have made an exhaustive investigation as to the " general rules which guide courts in declaring con- " tracts to be void as being in restraint of trade, and " therefore against the public policy of the country."

It then condemns this method as reading into the text of the act an exception without sufficient reason, saying:

" But we cannot see how the statute can be lim- " ited, as it has been by the courts below, without " reading into its text an exception which alters the " natural meaning of the language used, and that, " too, upon a most material point, and where no " sufficient reason is shown for believing that such " alteration would make the statute more in accord " with the intent of the law-making body that en- " acted it."

The opinion then proceeds to describe the argument in support of the agreement more minutely, and, particularly, that part of it which dwells upon the mischievous and ruinous character of railroad competition, and the necessity, in the public interest, of limiting it so as to enable reasonable rates to be secured, and insists that Congress could not have intended to make agreements criminal which had such a reasonable object. It admits the force of these arguments, but regards them as applicable rather to the *policy* of the act. It adds, however, that there are considerations which have some tendency to modify this view; such as the difficulty of laying down a standard of reasonableness, the public nature of the business of railroads, &c., and suggests that unanimity of opinion does not exist on the subject, and, consequently that it cannot be so strongly argued, as it might otherwise be, that Congress could not have intended to make all such agreements criminal. Its language on this point is as follows:

"We recognize the argument upon the part of the "defendants that restraint upon the business of rail- "roads will not be prejudicial to the public interest "so long as such restraint provides for reasonable "rates for transportation and prevents the deadly "competition so liable to result in the ruin of the "roads and to thereby impair their usefulness to the "public, and in that way to prejudice the public in- "terest. But it must be remembered that these "results are by no means admitted with unanimity; "on the contrary, they are earnestly and warmly "denied on the part of the public and by those who "assume to defend its interest both in and out of "Congress. Competition, they urge, is a necessity "for the purpose of securing in the end just and pro- "per rates."

The opinion then proceeds with a somewhat lengthy review of cases, and with arguments, tending to show that there is a widely extended conviction or belief adverse to the policy of such agreements, and it then reviews the situation, and, in the clearest manner, *re-states the precise question* which the Court was called upon to decide.

"As a result of this review of the situation, we find "two very widely divergent views of the effects which "might be expected to result from declaring illegal all "contracts in restraint of trade, etc.; one side pre- "dicting financial disaster and ruin to competing rail- "roads, including thereby the ruin of shareholders, "the destruction of immensely valuable properties, "and the consequent prejudice to the public interest; "while on the other side, predictions equally earnest "are made that no such mournful results will follow, "and it is urged that there is a necessity, in order "that the public interest may be fairly and justly "protected, to allow free and open competition

" among railroads upon the subject of the rates for
" the transportation of persons and property.

" The arguments which have been addressed to us
" against the inclusion of all contracts in restraint of
" trade, as provided for by the language of the act,
" have been based upon the alleged presumption that
" Congress, notwithstanding the language of the act,
" could not have intended to embrace all contracts,
" but only such contracts as were in unreasonable re-
" straint of trade. Under these circumstances we are,
" therefore, asked to hold that the act of Congress
" excepts contracts which are not in unreasonable re-
" straint of trade, and which only keep rates up to a
" reasonable price, notwithstanding the language of
" the act makes no such exception. In other words,
" we are asked to read into the act by way of judicial
" legislation an exception that is not placed there by
" the law-making branch of the Government, and this
" is to be done upon the theory that the impolicy of
" such legislation is so clear that it cannot be sup-
" posed Congress intended the natural import of the
" language it used."

It then reiterates its conclusion briefly stating the gronnds upon which it was based:

" This we cannot and ought not to do. That im-
" policy is not so clear, nor are the reasons for the ex-
" ception so potent as to permit us to interpolate an
" exception into the language of the act, and to thus
" materially alter its meaning and effect. It may be
" that the policy evidenced by the passage of the act
" itself will, if carried out, result in disaster to the
" roads, and in a failure to secure the advantages
" sought from such legislation. Whether that will be
" the result or not we do not know and cannot pre-
" dict. These considerations are, however, not for
" us. If the act ought to read as contended for by
" defendants, Congress is the body to amend it and

" not this Court, by a process of judicial legislation " wholly unjustifiable. Large numbers do not agree " that the view taken by defendants is sound or true " in substance, and Congress may and very probably " did share in that belief in passing the act. The " public policy of the Government is to be found in " its statutes, and when they have not directly spoken, " then in the decisions of the courts and the constant " practice of the Government officials; but when the " law-making power speaks upon a particular subject, " over which it has constitutional power to legislate, " public policy in such a case is what the statute en- " acts. If the law prohibit any contract or com- " bination in restraint of trade or commerce, a con- " tract or combination made in violation of such law " is void, whatever may have been theretofore de- " cided by the courts to have been the public policy " of the country on that subject."

There can be no manner of doubt what the precise question was which was considered and determined in the case above referred to. It was this: *Assuming* that the agreement was one in *restraint of trade*, would the circumstance that the restraint actually imposed by it was *reasonable*, relieve it from the condemnation of the statute? Or, in other words, does the statute, by a true construction condemn *all* agreements in restraint of inter-state trade, and commerce, or such only as were at common law unlawful?

There are some observations made in the opinion, after the close of the discussion of what was regarded as the main question which, if taken apart from the main body of the opinion, might indicate that, the Court regarded the question before it as being whether the agreement *in fact* restrained trade or commerce. These observations are as follows;

" Although the case is heard on bill and answer, " thus making it necessary to assume the truth of the

" allegations in the answer which are well pleaded,
" yet the legal effect of the agreement itself cannot
" be altered by the answer, nor can its violation of
" law be made valid by allegations of good intention
" or of desire to simply maintain reasonable rates;
" nor can the plaintiffs' allegations as to the intent
" with which the agreement was entered into be re-
" garded, as such intent is denied on the part of the
" defendants: and if the intent alleged in the bill
" were a necessary fact to be proved in order to
" maintain the suit, the bill would have to be dis-
" missed. In the view we have taken of the question
" the intent alleged by the Government is not neces-
" sary to be proved. The question is one of law in
" regard to the meaning and effect of the agreement
" itself, namely: Does the agreement restrain trade
" or commerce in any way so as to be a violation of
" the act? We have no doubt that it does. The
" agreement on its face recites that it is entered into
" 'for the purpose of mutual protection by estab-
" lishing and maintaining reasonable rates, rules and
" regulations on all freight traffic, both through and
" local.' To that end the association is formed and a
" body created which is to adopt rates, which, when
" agreed to, are to be the governing rates for all the
" companies, and a violation of which subjects the
" defaulting company to the payment of a
" penalty, and although the parties have a right to
" withdraw from the agreement on giving thirty
" days' notice of a desire so to do, yet while in force
" and assuming it to be lived up to, there can be no
" doubt that its direct, immediate and necessary
" effect is to put a restraint upon trade or commerce
" as described in the act.

" For these reasons the suit of the Government can
" be maintained without proof of the allegation that
" the agreement was entered into for the purpose of
" restraining trade or commerce or for maintaining
" rates above what was reasonable. The necessary

" effect of the agreement is to restrain trade or com-
" merce, no matter what the intent was on the part
" of those who signed it."

What is thus said, however, was, as appears by the language itself, in response to the argument founded upon the allegations in the answer concerning the innocent and even laudable *intent* with which the agreement was entered into. It was to repel the suggestion that the necessary import of the agreement could be changed, or affected by the intent of the parties in making it.

To infer from this language that the Court had seriously considered, or supposed it necessary to consider, whether the agreement was *in fact* in restraint of trade at all when it had previously stated, and more than once repeated, that the question argued and submitted to it was whether the statute condemned contracts in restraint of trade where the restraint was reasonable, and had debated that question so minutely and at such length, would be imputing an inconsistency. Doubtless the Court regarded the contract as being in fact in restraint of trade. The nature of the argument submitted justified this; and it is doubtless also true that the provisions of the contract stamped it, in the view of the Court, as of that character; but no question, at least none of such moment as the present one, can be regarded as considered and determined by a court, upon which, in its view, it has a concession covering the whole ground, and which it evidently deems not open to contestation.

Of course, in the foregoing observations designed to point out the real question determined by the Court in the case referred to, no criticism is intended. Courts can hardly be expected to decide cases upon questions not submitted and argued. Whenever such a course is followed complaint is apt to be made, or at least dissatisfactifon elt.

Whether it was prudent or expedient that counsel for the defendants in that case should have adopted a line of argument implying a concession that the agreement with which they were concerned actually was in restraint of trade is not matter for observation here; nor is it important to consider here whether that contract actually was one in restraint of trade. What we are now seeking to elucidate is the *rationale* of the decision—the precise question before the Court and the manner in which it was determined.

It is not wholly out of place, however, to suggest that the case might have assumed, in the view of the Court, a very different aspect had it been argued without the assumption that the agreement was in restraint of trade. The difficulty which the Court found in yielding to the argument on the part of the defendants was that it called upon the Court to declare that Congress did not mean what it had said, and that the word *unreasonable* should be *read into* the act in order to arrive at its real meaning. The Court did not intimate that this was impossible; and it fully admitted the force of the defendants' argument that Congress could not be regarded as having intended to convert into crimes agreements entirely innocent, and which had been repeatedly declared by the most intelligent, legal as well as economical opinion to be beneficial. There is reason to suppose that this argument would have been held sufficient, as it was in the case of Trinity Church *vs.* The United States (143 U. S., 457), if all opinions on this point had been unanimous. The insufficiency which the Court found with this argument was that opinions upon this subject were not unanimous; that there was a difference of view, it having often been asserted in popular and legislative discussions, that similar agreements were mischievous and opposed to the policy of the law. The Court did not feel that it could say with confidence that the legislation did not proceed upon an adoption of such views. Whoever calls upon a Court

to read into a statute important words not found there, assumes the burden of showing that such a construction is necessary in order to relieve the legislation from the imputation of an absurdity. The Court accordingly held that the elaborate arguments of the defendants, the force of which was fully admitted, showing the *reasonableness* of the agreement were out of place, for the reason that these views were not universally admitted.

But if the Court had regarded the question as being whether the particular agreement really was in restraint of trade, the nature of the inquiry would have been radically changed. The *actual character* of the agreement, its *purpose*, and its *necessary effect*, would then have become the points of direct consideration, and if it could have been shown that it did not in any just sense restrain trade at all, but on the contrary, advanced and promoted it, and that it was an arrangement essentially necessary to the proper conduct of the transportation business of the country, and moreover that such agreements had very seldom, if ever, been regarded by Courts or intelligent economists as in any way prejudicial to trade, the final question would have been whether such agreements were *within the class* of contracts in restraint of trade denounced by the statute. The defendants would no longer have been under the burden of showing that the word "*unreasonable*" should be read into the statute; but the plaintiffs would have been under the much greater burden of showing affirmatively that agreements really promotive of trade, and generally recognized as such, could be embraced among agreements "in restraint of trade." The weighty presumption that a legislature must not be taken as intending to convert innocence into crime would, of itself, have been conclusive against the contention.

There are certain observations in relation to the Anti-Trust Act which are properly to be made before proceeding to the argument.

There is no doubt that prior to and at the time of the passage of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited, in some minds, much alarm. Many industries were seen, or supposed, to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of *trusts*, and this term came to be employed, in a general way, to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be a rather reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield a greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends and, perhaps, the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed them-

selves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a *trust* to be legally defined so that a prohibition of it should not include a prohibition of the exercise of the clearest constitutional rights? Congress, surely, could not prevent the creation of corporations under State laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of States. And was it certain that these so-called *trusts* were, in every instance, necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts," or limit aggregations of capital in any form. The general *charge* was that these combinations were in some form *monopolies*, and *in restraint of trade*, but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies, or restraints upon trade, they should be prohibited from so doing in the future; and this is what Congress did and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined, are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

The first question we design to consider is whether the agreement violates any of the provisions of the Act referred to. To this end it is of much importance to have in mind the particular nature of the subject with which this Act deals, and how that subject has heretofore been treated in law and legislation.

It is immediately obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

We next observe that it is not *contracts* only of a certain character which are condemned, but that they are coupled together with certain other acts, presumably of a similar nature or tendency, namely, *combinations* or *conspiracies* in restraint of trade, and *monopolies*, or *combinations* or *conspiracies to monopolize*. Contracts, therefore, are dealt with, not so much as *contracts*, but as one form of *acts* relating to trade and commerce assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to a sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy upon which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way in which they are treated in the law. One description em-

braces simply ordinary business transactions, where parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar instances of this character.

Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs therefore to the law of *contracts*, and the treatises on that law usually embrace a chapter devoted to it.

But there is another and much smaller description of contracts supposed to be injurious to trade of quite a different character. They are not, properly speaking, *business transactions*. They do not involve the sale, leasing or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object

for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a *common interest*, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers, or employers, unite, in the form of agreement, to regulate hours of labor, or prices, or where merchants, or tradesmen, combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to surpress, or regulate, competition among themselves; or where a class of producers or dealers combine together to control a product, or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

The marked distinction between these cases and the ordinary business transactions first spoken of is that in the latter there is a *difference of interest*, sometimes regarded as a *hostility* of interest between the parties, each seeking to gain the utmost from the other; whereas, in the former, the parties are in the *same* interest, each seeking the *same* end. The term *contract* does not well express this sort of agreement. It is a uniting together for a common purpose—a *combination*—or, when thought to be of an objectionable character, a *conspiracy*. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but, in giving it this name we should not lose sight of its real character. In reality it is simply an *act*, and innocent, or guilty, according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for re-

pression, it is not enough to simply declare it illegal. The practice may, nevertheless, be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which law usually takes in respect to such so-called contracts is in the form of *prohibition* and *penalty*, and the subject belongs not to the law of *contracts*, but to the criminal law, where it is usually dealt with under the head of *conspiracy*.

We do not mean by the above observations that there may not be instances which partake, to a greater or less degree, of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust act belongs, is manifestly the one last described. The circumstance that *contracts* are grouped together with *combinations* and *conspiracies* and made the subject of *criminal* treatment, shows this very plainly.

The ineptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to reach that class of supposed mischiefs which flow from *combinations*. But the great bulk of the cases, probably nine-tenths, in which Courts have felt called upon to say anything about *contracts in restraint of trade*, has been the business transactions first alluded to in which an agreement has been entered into, not to exercise a particular calling, as where the keeper of a well patronized tavern sells out his establishment and good will, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but, surely even when void, there was nothing about them calling for the intervention of the

criminal law. And yet this statute bunches the valid and the void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed, would be, assuming that the act covers contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were, *in fact*, in restraint of trade or commerce between the states. That it is, *in fact*, in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this Court, and we expect to be able to show that the agreement is, not only not in restraint of trade and commerce, but highly beneficial to both; that Congress has never declared, or intended to declare it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objection on constitutional grounds, which will be dealt with by other counsel.

FIRST POINT.

The Court has no jurisdiction to entertain this suit, unless it can be found in the provisions of some statute.

1. The bill sets forth simply the commission of a misdemeanor, and an intention on the part of the defendants to repeat the offense. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary Courts of Common Law, is sufficient for the repression of crime, and exclusive adhesion to it necessary for the protection of the citizen.

2. This *ordinary* administration of the law of the land by the *ordinary* Courts of the land has been, from the first, the main stronghold of the lovers of constitutional liberty. It is the source of the extreme jealousy with which the methods of the Court of Chancery and the canon law, with their discretionary remedies, injunctions, positive commands and contempts, were ever regarded in England. The *friends* of our national Constitution were never able to answer the objections of its enemies founded upon the absence of guarantees against the introduction of these hated methods; and their first work after the adoption of the Constitution was to amend it by introducing those guarantees. Trial by jury was secured both in civil and criminal cases. It was made *impossible* for the legislative power to ever authorize the holding of any man to answer for a capital or otherwise infamous crime, unless on presentment or indictment by a grand jury. Can we suppose that the value of an adherence to these fundamental principles throughout the whole system of

remedial procedure was lightly esteemed, because it was not thought necessary or expedient to extend the constitutional safeguards to every offense?

3. In consonance with this deeply-seated conviction it has been uniformly held that Courts of Equity have no jurisdiction "to restrain the commission of crimes or to enforce moral obligations and the performance of moral duties; nor will they interfere *for the prevention of an illegal act merely because it is illegal.*"

High on Injunctions, § 20.

a. The precise question arose in the case of the Attorney-General *vs.* The Utica Insurance Co. (2 Johns. Ch., 371). A statute of New York prohibited the transaction of the business of banking except under certain conditions, and punished a violation of the act by imposing a penalty of $1,000. The Attorney-General filed an information in chancery, alleging a violation of the act and a continuance therein, and seeking for an injunction. Chancellor Kent held that the Court was without jurisdiction. He declared that he had searched in vain for the exercise of such a power, and that the precedents were all against it.

b. Has the law been changed? We know of no case which can be referred to indicating a change. On the contrary, the rule has been recently affirmed by the highest authority. Mr. Justice Brewer in giving the opinion of the Court in *In re* Debs (58 U. S., 564, 593), says, "Again it is objected that it is outside of the jurisdiction of a Court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A Chancellor has no criminal jurisdic-

tion. Something *more* than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the Court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear, the jurisdiction of a Court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law."

In the case at bar nothing whatever is alleged *except the mere violation of the law and the intent to continue it.* It is not alleged that such violation does, or will, in fact lead to the imposition of any unjust or unreasonable charge for the carriage of merchandise, or any unjust discrimination, or in any way diminish or impair any facilities for carrying on interstate commerce. Indeed, the avowed, and the apparent, purpose of the agreement is to secure justice, equality and improvement in interstate transportation, and this purpose stands admitted. All that is averred in the bill is that the method chosen to accomplish the purpose is prohibited by penal law.

c. It is contended that Courts of equity may interfere by injunction to suppress *nuisances.* This is true, but it would be a gross perversion of language to call the alleged offense in this case a *nuisance.* It is no more a nuisance than any other misdemeanor. But if it were a nuisance, equity can only interfere when a case of *necessity* is shown. It must appear that there is some present mischief so grave that an immediate remedy is demanded, and that the *ordinary* administration of justice would be ineffectual. The opinion of the Supreme Court in the case last above mentioned is conclusive upon this point. It asserted the jurisdiction of the Court in *some* cases of nuisance, but at the same time declared that a necessity for its exist-

ence must be shown. The bill filed in that case set forth the facts which constituted the necessity, and which made out in the opinion of the Court a special exigency of the most imperious nature. In the present case, no such exigency is shown, or pretended.

SECOND POINT.

The Anti-Trust Act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and, perhaps, the decision made by this Court in the suit of the United States vs. The Trans-Missouri Freight Association, should be regarded as a determination that the Attorney-General was at liberty in case of any violation of the provisions of the act to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition, in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce Act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication, at least, it is withheld; for in certain cases specially mentioned in Sections 6 and 13, jurisdiction is expressly given to courts of equity to grant

injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. "Expressio unius est exclusio alterius."

1. It may be pointed out that Section 12, as amended by the act of February 10, 1891 (26 Stat., 743), made it the duty of the District Attorneys "to institute in the proper Court and to prosecute under the direction of the Attorney-General of the United States *all necessary proceedings* for the enforcement of the provisions of this act and for the punishment of all violations thereof." But to rely upon this provision is to rely upon *implication*, when unequivocal language is required. And, if implication were permitted, it would be wholly insufficient, for this language *expressly* observes the distinction everywhere made by our law in reference to procedure as above insisted upon. If it allows suits for injunction at all, it allows them only when *necessary;* and they cannot be necessary, unless a case is made showing that the *ordinary* course of the law would be unavailing.

4. Moreover, such action can be instituted only by *the* District-Attorney, *to whom the Commission shall apply, and whom it shall request* to institute it. No such application or request is averred.

5. And, finally, the Commission upon any just interpretation of the Interstate Commerce Law cannot call upon any District-Attorney to act until it has exhausted *its own very express and particular powers* conferred upon it for *the very purpose of avoiding the necessity* of any other form of enforcing the law.

A scrutiny into the main provisions of the law will make this quite clear. In general, governments content themselves with the *enactment of laws*, general or particular, as the case may require, and leave to individuals the responsibility of shaping their conduct and their business in conformity with them, and do not subject them to the especial observation, supervision and direction of officials. The *public nature*, however, of the business of common carriers by railroad, and the importance of the subject of Interstate transportation by rail, have been regarded as justifying a system of *special supervision*.

To this end the Interstate Commerce Act, besides enacting certain legal rules, most of them pre-existing as part of the common law, devised certain *administrative* regulations and created an *administrative board* charged with the duty of seeing that they were carried into effect, and charged also with the duty of observing the operation of the system and securing in it a conformity to the law. The contemplation was that this Commission should keep in easy communication with both carriers and shippers, settle differences between them, and prescribe modes of doing the business suited to its various exigencies and conformable to law. No strictly *judicial* power was given to it. Legal learning was not made a qualification for the office, and though it was authorized to make orders of various kinds, and required to observe judicial methods in forming its conclusions as to orders proper to be made, no power was given to it to enforce such orders directly. To the end of such enforcement it was permitted and required to resort to the judicial tribunals, and in these the controversy, if any, was to be tried *de novo*, a *prima facie* weight, however, being, constitutionally or unconstitutionally, assigned to its previous findings on matters of fact.

By the original act such resort to the Courts could be had only in the following cases:

First.—To compel carriers to file with the Commission, and publish in the manner prescribed by the act, their schedules or tariffs of rates, and for this purpose a mandamus or an injunction might be issued (§ 6).

Second.—To compel the attendance of witnesses and the production of books, papers, &c., before the Commission (§ 12).

Third.—When the Commission had made any lawful order or requirement upon any carrier, and compliance therewith had been neglected or refused, the Courts might be appealed to, either by the Commission or by an interested party, to affirmatively enforce it, and in such cases the Courts were authorized to enforce it, by a "writ of injunction or other proper process, mandatory or otherwise" (§ 16).

By the original act, no suit or prosecution in the name of the United States was authorized to be instituted at the instance of the Commission. The act denounced penalties for the violation of its provisions, and, of course, the enforcement of these was a proper part of the duty of the United States Attorneys as in other cases.

A very unique feature of the original act is to be particularly noticed. It was apparently designed to do away with the necessity of a resort to *any Court*. Complaint might be made by any private person or corporation, or by any public corporation or municipality, against any carrier of being injured, which complaint the carrier might be called upon either to satisfy or answer. If he satisfied it, that was the end of the matter; if not, an *investigation* by the Commission was required; and such investigation might be instituted on the request of any Railroad Commission of any State or Territory, and also on the mere motion of the Commission. The result of the investigation was to be declared by a report which might determine that some law had been violated, with, or

without, damage to any person or corporation, whereupon notice was to be given by the Commission to the offender requiring the violation to be discontinued, and the injury inflicted, if any, to be repaired within a reasonable time specified in the notice. If this injunction was complied with, the carrier was thereupon to be relieved from any further *liability to the party injured, or penalty*.

The purpose seems to have been to constitute a body which should occupy such an intimate and friendly relation both to carriers and to shippers that its intervention would be habitually called upon in cases of disagreement, and appeals to the Courts for the purposes of redressing either private or public injuries would become less necessary. (Sections 9, 13, 14, 15 and 16.) This is the more evident from the circumstance that while private suits for damages in the ordinary Courts are given in case of any violation of the provisions of the act, both remedies could not be pursued. An election was required. (Sec. 9.)

Prior to the amendment of Sec. 12 in 1891, as above mentioned, it is plain that the Commission was not authorized to direct, promote or request any action by any District Attorney to enforce the law or punish its violations. Whatever judicial power was to be invoked was to be applied for by itself in its own name, or, where private persons were interested, in their names.

The amendment was evidently adopted, not to supersede or displace the prior provisions, but to supplement them. The design was to arm the Commission with additional powers to enforce the law.

It appears, therefore, that for the enforcement of the provisions of the Interstate Commerce Act, the Commission is clothed with *two* entirely distinct authorities. One is to bring about by its own action a peaceful conformity with the law; the other is, when this fails, to set the remedial process of the law in motion. The first contemplates an *investigation and*

report by the Commission in case of anything done by any common carrier subject to the provisions of the act "*in contravention thereof*," and this either at the instance of others, or upon its own motion; and in case of an adverse report, to give the carrier *notice* to discontinue his offence and make reparation for any injury inflicted; and compliance with the notice puts an end to any civil or criminal liability. Such a result must, from its very nature, and from the order in which it stands in the legislation, be taken to be the one *preferred*, and, therefore, the duty is cast upon the Commission to *first* try to bring it about.

With what propriety can the Commissioners compel *other* public officers to take steps to right wrongs by the measures of force and punishment, when there is a *peaceful* method specially contrived and lodged with them which they have not tried?

The law evidently assumes that there may be *unconscious* violations of its provisions by carriers. What an unjust discrimination between shippers may be is a question upon which honest men may differ. It depends upon whether the service performed in different cases is the *same* and rendered under the *same circumstances*. The service can never *literally* be the same, or rendered under the same circumstances. The carriers may honestly think that cases are substantially different and justify a different charge; but a jury may think otherwise, and liability to fine and imprisonment be declared where there was no guilty intent. If the carrier were apprised by an impartial and enlightened board that they thought him in the wrong he would probably acquiesce. The law was plainly framed to save innocence in such cases.

If several carriers are accused of discrimination, the Commission, on the view the government must support, are at liberty to incite the District Attorney to punish *one* with utmost rigor of the law, and shield and protect the *others* from any punishment whatever. Are such discretions anywhere lodged in our law with

any public officers? Surely, before the conclusion is reached that they are, it must appear impossible to find any other interpretation consistent with the language employed.

Where mild and severe remedies are prescribed for the same offense, we must, in reason, say that the former should be resorted to before the latter.

It may be suggested that where an agreement apparently violating the law is openly filed by carriers, there can be no need of an investigation. The true statement is, not that there is no need of investigation, but that the task is extremely easy. The case of United States *vs.* Missouri Pac. Ry. Co., 65 Fed. Rep., 903, is not a binding authority, and should not be followed. But the point presented here was not made in that case.

THIRD POINT.

A clear understanding should be had at the outset, of the meaning of the terms with which we are dealing. The class of contracts condemned by the Anti-trust act is defined by the EFFECT they have upon trade or commerce. They are such, and such only, as have the EFFECT of restraining trade or commerce. The ACTUAL EFFECT which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

1. This may seem self-evident, and indeed is so. But the possible suggestion might be made that there

is a class of contracts, *called*, or *named*, "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect. There is no foundation for such a suggestion. There is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever, heretofore, the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined by an inquiry as to its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might, or might not, be *called* or *styled* a contract in restraint of trade.

2. Moreover we are dealing with the *criminal* law which never classes acts and makes them punishable under arbitrary names, without regard to their supposed effects, as being actually mischievous or otherwise. This would be putting innocence on a par with guilt.

And, besides, the fundamental requisite of that law is the definition of offences is *certainty*. If we take the class of contracts in restraint of trade as embracing those, the actual effect of which is to restrain it, the meaning is entirely certain, and limits and directs the inquiry in the case of any contract to the single point of ascertaining whether its effect upon trade is *restraint*, which is the very thing the law intends to repress. But if we were to assume that there was a class of contracts *known* or *called* contracts in restraint of trade, irrespective of their actual tendency, the question whether any particular contract was punishable under the act would involve the inquiry simply what the *designation* of the contract was, and not what its actual effect was, the consequence of which would be that the act would be wholly void for *uncertainty;* or, if

not this, that some contracts would be made punishable in which there was no trace of public mischief, and others would escape punishment which in their effects were distinctly mischievous.

3. Doubtless there are certain contracts which readily *come to mind* where contracts in restraint of trade are spoken of, and which may therefore be taken as good examples of the class. They are such as directly *purport and assume* to restrain trade, and which, consequently, do, in some sense and degree, at least, necessarily restrain it. Examples of these are to be found in the instances of such contracts as were considered in the leading case of Mitchell *v.* Reynolds (1 P. Wms., 181), where the condition of the bond in suit was not to keep a victualling house or vend liquor within certain limits, or during a certain time, and in Davis *v.* Mason (5 T. R., 118) where a surgeon agreed with A. not to practice his profession for fourteen years within ten miles of where A. lived, and in very numerous other cases of similar agreements. If there could be said to be any class of contracts known and called by the *name* of contracts in restraint of trade it would be these which do, *in terms*, restrain it.

But if these were to be taken as constituting the class, the agreement we are now dealing with would, very clearly, not belong to it. Agreements for combinations among persons engaged in the same employment to promote their supposed interests, as of laborers or employers, or merchants or trades-people, have rarely, if ever, been styled agreements in restraint of trade. They do not, in general, purport or assume to restrain it. They may, in effect, *actually* restrain it, and thus be brought under the condemnation of the statute, when interpreted, as it ought to be, as apply-

ing to all such contracts, as *actually* restrain trade and no others.

4. There may be occasional instances in which agreements of the character last mentioned have been spoken of as being in restraint of trade. They are, however, rare, and, under the fundamental rule which enjoins *certainty* in the criminal law, the statute could not be held as intending to include in a class of acts which it makes criminal any acts as to which there may be any doubt whether they are ordinarily understood as belonging to the class. How should any person know that a contract which does not purport or assume to restrain trade, and which may not in fact restrain it, belongs to a class designated as contracts in restraint of trade. The case is quite different if the contract *in fact* restrains trade. That is a thing of public mischief, and every one may properly be required to take notice of the effect of agreements to which he becomes a party.

It follows, therefore, that it is only by adopting the definition of the term contracts in restraint of trade which is herein insisted upon that the agreement under notice can be brought within the class.

5. If we consider, as we should, the branch, or department of criminal legislation to which this statute belongs, it will appear still more clearly that the *class* of contracts or combinations which it condemns is those, and those only, which restrain trade *actually*, and *as a whole*.

In the interpretation of criminal legislation it is necessary to have constantly in view what criminal law really is, what objects are sought to be gained by it, what branch or subject of that law the particular statute

deals with, and how that subject had previously been dealt with by the law. In other words, the true principles of criminal legislation are to be kept in mind, and in any cases of doubt we are to assume that the legislature has designed to act in accordance with such principles. If these rules are disregarded, and an interpretation adopted founded exclusively upon the naked language employed taken by itself, the legislature would often be held to have converted innocent and useful practices into crimes.

Applying these rules we perceive that the whole purpose and object of Congress was not to make any *acts*—we mean *acts* as distinguishable from *attempts* — criminal, but only *combinations* and *conspiracies to do them*. The object was not to stamp and punish as a crime anything which *one man alone* might do, but *combinations and conspiracies* to do certain things. The penal enactment against *monopolizing* contained in the second section does not call for any qualification of the foregoing statement. The purpose and meaning of that are too indefinite. In its original meaning a monopoly was an exclusive privilege of dealing in a certain thing acquired by royal grant, of which nothing remains among us except patent rights. This cannot have been intended.

6. But it is needless to prolong this particular discussion. The opinion of this Court in the case of the Trans-Missouri Association fully adopts our definition. It nowhere intimates that any contract actually restraining trade could be taken out, or any one not actually restraining trade brought into, the guilty class by making the class an arbitrary one. On the contrary, in the few observations to which we have already alluded, made by the opinion in answer to the argument founded upon the allegations of the answer touching its intent, it states, in terms, that

the guilt or innocence of the agreement must depend upon its actual effect. It says: "The question is "one of law regarding the meaning and effect of the "agreement itself. Does the agreement restrain "trade or commerce in any way so as to be a viola- "tion of the act?"

FOURTH POINT.

There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To RESTRAIN is to HOLD BACK, to CHECK, to PREVENT, and thus to DIMINISH. It is INJURY to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract INJURES and thus DIMINISHES, or tends to diminish, trade or commerce, it cannot be deemed as IN RESTRAINT of trade or commerce.

1. It can hardly be needful to enlarge upon this point. Commerce is everywhere in our law regarded as a public and national good. Anything which increases, extends and enlarges it is favored, and anything which injures and lessens it is discouraged, and may be prohibited.

The acts of individuals, separate or combined, may either aid, or injure, public interests. Where they aid, they are encouraged by the law, and where they injure, they may be repressed. It should be observed, however, that society relies far more upon the private acts of its members than upon its own corporate action for the promotion of useful public ends. Indeed it

is in general only where private action is inadequate that the power of law is invoked.

There is a multitude of forms in which persons in their private capacity combine together to prosecute, facilitate, increase and advance trade and commerce. The numerous exchanges and boards of trade are instances. Agreements and combinations of this nature *affect* trade and commerce in many forms; but unless they *injure* and *lessen* it, they cannot be said to *restrain* it.

FIFTH POINT.

The agreement under which the Joint Traffic Association was formed, and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the Act of July 2, 1890.

I. It does not *in terms* purport, or assume, to restrain or limit trade or commerce. No one of the parties to it undertakes in any manner to refrain from doing business. Indeed, it evidently assumes that all the parties to it are to continue to do all the business which their facilities enable them to do, and to strive against each other for a larger share of the business in every way except one.

It does, indeed, purport to restrain *competition*, although in a very slight degree, and on a single point. That is *one* of its objects; and if competition and commerce were *identical*, being but different names for the same thing, then, indeed, in assuming to restrain competition even so far, it would be assuming, in a corresponding degree, to restrain commerce, but surely no such identity will be pretended. Commerce

is the interchange of commodities. Competition is one of its *incidents* only, and but an occasional incident at that. It can and does take place on a large scale and in numerous forms without competition. To identify a thing with one of its occasional incidents would be an error too gross to call for any caution against making it.

II. This, however, is not enough to exclude the notion that a restraint upon competition must *necessarily* restrain commerce. It is *conceivable* that a restraint upon competition, although competition is but an occasional incident of commerce, must still necessarily restrain the latter; but, however conceivable, it is by no means true. The contrary is often true; namely, that such restraint enlarges, increases, and benefits it.

1. One of the common and immediate effects of competition undoubtedly is to lower the prices of the things as to which the competition arises, but to say that low prices are necessarily a benefit to commerce, or anything else, would be a wild assertion. On the contrary, declining prices are generally thought to be, and often are, in fact, the incidents and precursors of commercial and business depression, and rising prices, of prosperity. Low prices of things may benefit the buyers of them, but they correspondingly injure the producers and owners of them.

That competition is, in general, a good thing, that it is what is called "the life of trade," and that artificial efforts to repress it may have an injurious effect, opposed to a sound public policy is quite true; but to infer from this that it is so under all circumstances, or that it may not be productive of the most extensive

mischief, is a conclusion of ignorance, utterly refuted by the teachings of experience, and long since discarded by all enlightened minds.

2. But it is worth while to employ a few words in pointing what the true and great benefit of competition is, and when it ceases to be beneficial and becomes the source of mischief.

COMPETITION; ITS BENEFITS AND ITS EVILS.

Competition, when it takes place among the sellers of a particular thing, enables the buyers to obtain it at a lower price, and they gain at the expense of the sellers. No one will think this any more a good than if the conditions were reversed, and the buyers became the competing parties, in which case the sellers would obtain a better price and gain at the expense of the buyers.

It is sometimes, but erroneously, thought that competition makes prices low *all around* and that this is an advantage to *poor people*. In the first place it is not true that competition has any tendency to make low prices generally. Low prices are so by comparison only. Indeed there is no such thing as *low* or *high* prices generally. These can be predicated only of *particular* things. Such things may be said to be high or low in comparison with other things. To say that prices of everything (which, of course, would include money) were *high*, or *low*, would be insensible. If the prices of all things are equally diminished, by competition, or anything else, society and its members are left just as they were before. Nor is it true that low prices for commodities are necessarily good things for *poor people*, because they are *consumers*. The effect is rather the other way; for although they are consumers,

they are, at the same time, and to a somewhat greater extent, on the whole, *producers*.

To learn what the real beneficial results of competition are we must turn our attention to its effects upon the material interests of society *regarded as a whole*.

There is no class of persons in life whether engaged in labor, or in the business of employing it, or owning capital employed in industries, who do not, to a greater or less degree, engageo n the one hand, in competition, or who do not, on the other, feel the effects of competition in which they do not directly engage, and it would take a volume to trace and describe its entire influence. Nothing more can be done here than to illustrate its general effect, and, for this purpose, some instance should be taken where it is earnest and active and where, therefore, its effects may more readily be seen.

For this purpose we may take the manufacture of some description of goods for a *particular market*, open alike to all in proportion to their skill and pecuniary resources. The natural desire to gain as much as possible of the trade will induce underbidding, the practice of economies, the introduction of improved machinery, &c., until the least skilful, or those who possess the smallest resources, find that they are engaged in an unequal struggle, and will retire from the field by taking their capital, when they can disengage it, into some other branch of industry, where the competition is less fierce; and thus the rivals are reduced to a smaller number and would eventually be reduced to a single one, unless the competition should be arrested by some formal or tacit agreement. If the effect stopped here the results would be, on the whole, advantageous to society, for the rivals being stimulated to employ all their energies, the art would be perfected, the expense of production diminished to the benefit of consumers, and the workmen and capital employed would be in the receipt, the one, of reasonable wages, and the other, of a fair profit.

But the effects may not, and usually do not, stop at this point. The victors, in possession of the field, may by their superior advantages, machinery and skill be able, even at the reduced prices, to reap a profit greater than that earned in other industries. This offers a temptation to those engaged in such other industries to transfer their capital to the more profitable one, or, what is more easy, the *unemployed capital* derived from the harvested profits of other industries, of which there are always large amounts in busy communities embracing varied industries, is tempted to the more profitable industry, and the rivalry is thus reopened. If the victors in a field of industrial competition wish to secure undisturbed the fruits of their triumph, it behooves them to make a judicious use of it, and not to attempt, by raising prices, to increase profits over the average return upon invested capital. There can be no single proprietor, or combination of proprietors, except where the article cannot be produced indefinitely by the mere application of labor or capital, that is to say, except where there is a monopoly, either natural, or created by the state, so powerful as to defy competition. A short lived advantage may be secured, for even unemployed capital will not immediately respond to the temptation, and time is required to establish rival plants; but no man, or set of men, will be allowed to permanently reap a harvest in any considerable degree above the average. The risk in such cases by one who dares to challenge the prize, or a part of it, is not much. Men will not, indeed, venture their whole fortunes in such contests, but will be quite ready to risk a part of their surplus profits, and the facilities for aggregating a fund through corporate organizations are everywhere to be had.

Even if the victorious competitor had driven every rival from the field, and felt that no others would dare to enter it, he would not attempt to increase his profits by raising prices, for the reason that such an expe-

dient would not accomplish the end. The truth is now generally known that there is scarcely any commodity which is an absolute necessity, and, consequently, that the extent of the demand for anything is governed, largely, by the price. An increase of price, therefore, decreases the demand, and may do so to such an extent as to actually diminish the aggregate of profit, and, conversely, a decrease of price often has the effect of so largely increasing the demand as to result in increase of profit. Take the case of petroleum oil of the quality used in this country for light. Cheap as it is, it is yet beyond the means of the swarming millions of India, and none of it, or but very little, is sent thither; but a cheaper grade can be made which will withstand the danger of explosion, and yet furnish a much better light than is otherwise available for this class of people. Of course there is but an exceedingly small profit upon a gallon, but the mere circumstance that the price is so reduced as to be brought within the means of this enormous body of people creates a demand which supports a prodigious commerce of hundreds of millions of gallons annually.

These methods to which manufacturers on a large scale, who are supposed (although erroneously) to be beyond the reach of competition, resort, are really, themselves, competition on a grand scale. The refiners of oil for export to India are competing with the producers of other means of illumination there, and driving them from the market. It is the same with the producers in this country of electric lighting. They are competing with the manufacturers of gas, and compelling a reduction in the price of the latter.

What may be called the beneficial effects of competition are above displayed, and beneficial in a supreme degree they indeed are. They tend to secure two great results; *first*, the equalization of gains and advantages both to workmen and capitalists in all industries; *second*, the stimulation of every faculty of man to produce useful commodities at the least possible expense

and thus to increase the aggregate product and assign to each person engaged in the work a larger absolute share, and place a larger share of a useful thing within the reach of all. Any voluntary human conduct aimed to suppress or check the beneficent operation of this principle ought indeed to be disfavored by the law, and perhaps punished by severe penalties.

But there is a counterpart to this picture which reveals mischiefs and miseries flowing from the eager prosecution of competition which sometimes seem, for the moment at least, to equal, or outweigh, the benefits. The predominating motive in the rivalry being private and individual gain, no tenderness, or even thought, for the welfare of others is encouraged. Many are striving for the same thing, and every available weapon will be employed. Scruples are apt to be silenced, and "to get there" is a vulgar phrase which well describes the character of the struggle. In such a struggle the weakest goes first to the wall, but if the struggle is protracted all will go in their order until the field shows a single combatent only with no rival. The defeated, where they have any strength left, go into an inferior class to renew the same contest with less powerful antagonists, and the champion soon receives a challenge from other quarters which will put his powers to a severer test. This operation is constantly going on in the industrial world, and the law of the survival of the fittest seems to exercise everywhere its pitiless sway.

The crushing and destructive effect of this law is principally felt in those industries where the bulk of the capital is invested, not in the purchase of mere raw materials for manufacture, but in permanent physical structures. In these cases the capital cannot be disengaged. If that part of the demand which it once satisfied has been gained over by more successful rivals, there may be no longer any use for it and it may becomes worthless, and in effect lost. If the result of this loss is, on the whole, to enable the product to be fur-

nished to the public at a less rate, it is simply a case where the concentration of the industry in one, or a few, establishments has had the result of furnishing the public with a commodity at a less cost, and the loss, although a calamity to individuals, may be overcome by a corresponding public gain. If, however, the plant is one really needed by the community, and the only effect of its destruction is to induce the victorious rivals to subsequently raise the prices which they had previously lowered, the private loss is not counter-balanced by any public gain, and becomes a public, as well as private, calamity.

These observations show that there is a point beyond which competition may not only cease to be beneficial, but become exceedingly injurious, not only to private individuals, but to the public also. When prices have reached the point which places the profits of a particular industry on a level with the average profit of industries generally, the further prosecution of the struggle is likely to be injurious to the community, and the competition becomes destructive and deadly, precisely in proportion to the difficulty of disengaging the capital employed.

Those who, like the writer of this brief, prefer a society of which the characteristic feature is a large number of small, but independent, proprietors, look with regret upon the substitution in place of it of organized masses of human beings, who seem to be mere parts of a great industrial machine; but this means that they don't like a densely peopled world, and do not stop to think that we actually have one, and must adapt ourselves to its requirements. The opinion of Mr. Justice Peckham makes an allusion—perhaps mournful allusion—to the inconvenience and distress attendant upon modern changes in industry, and justly observes that they are probably unavoidable. But some of his observations seem, it is submitted, not entirely well founded. He says: "In business or "trading combinations they (the results of such com-

" binations) may even temporarily, or perhaps per-
" manently, reduce the price of the article traded in,
" or manufactured, by reducing the expense insepar-
" able from the running of many different companies
" for the same purpose. Trade or commerce under
" those circumstances may, nevertheless, be badly
" and unfortunately restrained by driving out of busi-
" ness the small dealers and worthy men whose lives
" have been spent therein, and who might not be able
" to readjust themselves to their altered surroundings.
" Mere reduction in the price of this commodity dealt
" in might be dearly paid for by the ruin of such a class,
" and the absorption of control over one commodity
" by an all-powerful combination of capital." But what is it that *drives* the small dealers out? If they are *driven* out, it is from being out-bid and under-sold; that is, they are driven out, not by a *restraint* upon competition, but by the *action* of competition. If it is desirable, on public grounds, to save them from ruin (and it may be) it can be done only by *arresting the competition*, and this can be effected only by an agreement fixing prices at a point which will enable them to live, or *buying them out*, which will save their capital, or part of it, which they may employ in fields where competition is less strenuous. The inevitable result is thus anticipated, and its harshness and misery taken away or diminished. The effect, in either case, cannot be called a restraint upon trade, for, it is admitted that trade in the article is increased. This is the necessary consequence of the diminution in price. The increased expense of numerous establishments, while they existed, was itself a restraint on the trade, which was done away with by the consolidation. Whether the enlargement of the trade gained at the loss of independent proprietors is, on the whole, a social benefit may be debated; but we should not forget that the real cause of the loss of the small independent proprietors is the *action* of *competition*, and not of those

agreements which simply soften and ameliorate its harsh and destructive features.

It is sometimes thought that the analagous competitive struggles among the brute orders of creation are even more destructive, but the fact is far otherwise. They may be more fierce and violent, but they have fixed limits. The brute cares only for the wants of his body, and when these are satisfied he lies down contented. An equitable division of the bounties of nature is thus effected among such a number as that provision will suffice to maintain. But the desires of man have no such limitations. However much he may acquire, he is still greedy for more, and is never absolutely satisfied. "*Nil actum reputans dum quid superesset agendum.*"

Is there, then, nothing which can set bounds upon this pursuit of material power and wealth and check its destructive tendencies while still preserving its beneficial effects? Something there must be, or the condition of the world would be much worse than we actually find it to be. This something is the fact that the greed of gain is, after all, not the supreme desire of man. *Happiness* is his "being's end and aim," and we are told that what is called the faculty of reason is bestowed upon him to enable him to better determine how, by checking some, and cultivating other, tendencies of his nature, he can reap the largest share of that.

The mode in which this faculty operates is sometimes by stimulating, but more often by *restraint*. If some only practice restraint, while others do not, the former surrender themselves as the mere victims of the latter. It is necessary that *all* should restrain themselves in the same manner, that is, in accordance with the same rules. It is for no other purpose than this that governments, in their just theory, exist.

But it is only a small part of the restraint which human society requires that governments undertake to impose, or are fitted to impose. Not to mention that

which proceeds from tacitly recognized customs, there are multitudes of voluntary organizations in the various departments of life which frame rules for the conduct of their members, and have ways more or less efficient for enforcing them. The restraining interference of government is, and should be, resorted to only when voluntary means fail, or are unsuitable for the purpose. They are, of course, unsuitable when the needed restraint is that required for the small and exceptional class which will not obey any rules except such as can be enforced by punishment, and hence we find that the interference of government is principally exhibited in the criminal law.

It is quite manifest that these restraints, from whatever source they proceed, whether from the voluntary organizations of individuals, or from the great all embracing organization which holds the sovereign power of the state, are essentially of the same character, and have the same objects in view; in other words, they are *modes of government*.

They are found nowhere more frequently than in the industrial pursuits of life, because it is there that they are most needed. It is there that the mercenary and individual desires and ambitions are most earnest and active, and where ungoverned action is likely to prove most injurious. They exist there to the greatest extent because the necessity for them is there most felt. No one would think of regarding them, in general, as injurious, because the necessity for them is manifest; and surely they would not be regarded as restraining trade, the very object of them being to promote trade. They are not aimed *against* anybody. They are simply *for* those who unite to form them, and yet are indirectly for the general benefit, for what benefits a part, without injuring others, benefits the whole.

An illustration may be introduced here. Take the case of the hack service at the railway stations in an ill-conditioned city. It happens, in the absence of

regulation, that great opportunities are offered for exacting excessive charges from passengers wishing that service, especially strangers. A crowd of rough and disreputable fellows with wretched conveyances, avail themselves of it, and the respectable drivers, who would greatly prefer to conduct their business with decency, are compelled to enter into competition with them, or abandon their business. Passengers, upon their arrival, are set upon by an ill-mannered crowd, outbidding each other in their pretences as to charges and conveniences, and such as take a conveyance find themselves, when set down, in dispute with half-ruffians as to the charge agreed upon. The consequence is that although many really wish the facility, few make use of it, except in case of sheer necessity, and the thought of every passenger is how he, or she, may best escape the rude annoyance sure to be met with on reaching the station. The business is effectually ruined. Where a dozen decent men might be employed usefully to themselves and others, a half dozen ruffians are engaged in plunder.

A proper municipal ordinance is passed and enforced under which the charges are fixed at a reasonable rate, and a passenger wishing the service is quietly shown to a decent vehicle. This of course is a *restraint*, and a restraint upon competition, but no one would think of it as a restraint upon *trade*. On the contrary it *creates* trade, and is indeed the necessary condition under which anything properly called trade in that branch of industry can exist. Now if this were not brought about by a municipal ordinance, the same thing might be attempted by a voluntary union of the honest and respectable drivers acting with a view to their own advantage. If an association were formed by them under which some superintendents in a recognized uniform should quietly conduct passengers wishing the convenience to some decent vehicle which would take them to the desired place with no apprehension of imposition or trouble

with the driver, the arrangement might be quite as effective as the ordinance, and even more so. No doubt there is *restraint*. All are bound by the rules of the association; but it is no more an agreement in restraint of trade, than the ordinance was a law in restraint of trade. Either would be equally in promotion of trade, and be correctly so styled.

An exception, however, is to be noted here. A few individuals of some trade or class, desiring to obtain an unequal and unfair advantage over others of the same class, or a whole class desirous of obtaining a similar advantage over the public, may unite together and take action for such purpose. An agreement for such a purpose would be of a very different character, and might be made a proper subject of legal prohibition.

Where there is already a large profit on some manufactured article, and the manufacturers combine in the form of trust or otherwise to fix prices, the unfair purpose is unmistakable. But where manufacturers are already engaged in a ruinous competition, and the profits afford no adequate return upon the capital, an agreement fixing prices is of a wholly different character and may be very useful not only to the parties, but to the public. Where the business is really *overdone*, as is often the case, *somebody must go out;* and competition will *drive out* the weaker parties with total ruin to them, unless the stronger anticipate and mitigate the inevitable result by joining together and *buying* them out. This is one of the beneficent modes by which the too pitiless action of competition is softened and ameliorated. These considerations confirm the correctness of the general statement that the competitions of men, whether in trade or elsewhere, must, in order even to preserve and promote the interests in which the competitions are exhibited, be restrained, sometimes preferably by law, sometimes preferably, by private agreement and organization.

Indeed, it may be said with entire truth that there

is no beneficent social force or social interest which does not require the guidance and restraint of *regulation* in order to promote and secure its own objects—a regulation sometimes effected by the voluntary action of men, and sometimes, where this does not suffice, by the compulsory power of law.

3. It may be thought that the above observations concerning the necessity of restraining competition are unnecessary, for the reason that the truth of them is so obvious that no one could be expected to call them in question. They would not have been introduced here except for the notion, quite common among those who have given little thought to the subject, that restraints upon competition, of whatever character or extent, are open to objection. The only conclusion now sought to be drawn is that a restraint upon competition does not, *of necessity*, restrain trade, but *may* even *promote* trade.

4. The true field of discussion in relation to this agreement is now disclosed. The material considerations turn upon the effects of *competition* upon the business of railroads, whether they are favorable, and how far favorable, to the commerce in which they are engaged, whether they are ever unfavorable and injurious to that commerce, and whether, and how, such injurious effects may properly be avoided. If the restraint on competition effected by this agreement is, necessarily, in the eye of the law, a bad thing in its effect upon trade, injuring and diminishing it, then, although, trade is not, *in terms*, restrained by it, it is so *in fact;* and if, on the other hand, it is, in the eye of the law, beneficial to trade, or cannot be seen to be injurious (for the burden of

establishing its injurious tendency is upon the plaintiffs), it must be held to be unaffected by the statute.

5. Considerations showing that the restraint was not only not injurious, but highly beneficial, were urged on the argument of the suit against the Trans-Missouri Association; but the Court, as the issue was there made up, could give no weight to them—could not even take them into account—for the reason that they were not unanimously agreed to. The Court was asked to read into the statute words not found there, and the ground of the request was that unless this were done, an intent would be imputed to Congress to condemn many beneficial agreements as crimes: but the answer of the Court was, in substance, and almost in language, that lawyers, judges and legislators were not *in unison* to the effect that the agreements referred to were beneficial, or not injurious; that there were widely divergent views upon the subject, some condemning them, while others favored them, and that it was impossible for the Court to say that Congress may not have entertained the view of those who condemned them.

But the question now is, *not* whether words not found in the statute should be *read into* it, but what the statute, as written, *includes*, and the burden of showing that this particular agreement is in restraint of trade or commerce, and so within the condemnation of the act and a crime in those who executed it is upon those who make the assertion.

III.—The agreement is question, as a whole, and, particularly, so much of it as affects competition, is in the highest degree *promotive* of trade and commerce.

1. The whole inquiry turns upon the actual nature, operation and effect of the agreement. These must be understood before any intelligent judgment can be pronounced. The necessity for a just and complete comprehension of this is the more plain from the circumstance that wide differences of judicial opinion have arisen concerning agreements bearing resemblances more or less near to the one under discussion—differences which, for the most part, are imputable for their origin, not to different views of purely legal doctrines, but different views as to the real facts to which such doctrines are to be applied.

2. The first step in ascertaining the nature, operation and effect of this agreement is to look closely into the actual state of facts which called it forth and to which it was to be applied; that is *to the actual business of the railway transportation affected by the agreement as it stood at the time the agreement was made*. And to this end a glance is needed at the historical development of this business, beginning with its origin.

The Origin, Development and Present Condition in this Country of the Business of Railway Transportation.

It would probably be true to say that upon the full institution of the system of private property, which is the foundation of our civilization and shapes its course at every step of its progress, wherever there was a human want for the supply of which men were willing to pay, it would be supplied in some way by the voluntary action of men—without the aid or interference of government. There are, however, some needs which, as has always been supposed, could be

best supplied by the direct agency of the state. These are very few in number, and, in general, limited to those which every individual requires to a greater or less degree, and to the furnishing of which every one should be compelled to contribute whether he wishes to do so or not. Among these universal needs, that of *ordinary highways on the land* is perhaps the most conspicuous and illustrative. They have generally been established and maintained by the public, and some recent developments connected with turnpike corporations have perhaps taught the lesson that they always should be.

When, however, the possibility and vast benefit of steam locomotives was revealed the question became a different one. The vehicles of carriage were seen to be practically inseparable from the highway, and whoever constructed and maintained this must undertake the work of operation, and thus engage in the business of a common carrier. It is useless now to discuss whether the State should have undertaken this whole work. It chose not to do so, and the reasons for this choice, if it were worth while to go into them, would, in the judgment of most minds, sufficiently defend it.

We have just observed that where there was an existing want for a supply of which men were willing to pay it would be supplied by private individuals: from which it would follow that simple abstinence by the public from building railroads would lead to the work being done by others. But there was an obstacle to this in the circumstances that the establishment of highways being habitually regarded as a public function, the expense of which might, whenever thought desirable, be reimbursed from tolls, the State would permit no competition for these with itself, and besides, an appropriation of land was necessary, which could be made only under the authority of the State. The building and operation of railroads being thus what is called a public franchise, private individuals could not engage in it without a grant from the public. This

appears to be the only point of difference between railroad business and other callings, so far as respects the operation of general industrial laws.

The State might have chosen to grant *exclusive* franchises for specified territories. This would have been to relieve its grantees from the influence of competition except such as would proceed from other methods of transportation, in other words to grant monopolies. Such a course would have been open to obvious, though perhaps not conclusive, objections. It would have been a *limiting of the supply* of a useful public facility for the benefit of a few. If the State determined that it would not itself engage in the business, some reasons of sound policy suggested that it should be thrown open to all.

This course was accordingly universally taken. Private individuals were invited to expend their own means in furnishing the facility by offering franchises to all who would take the hazard. The simple result was that the difference between railroad and other branches of business in great measure disappeared. The former stood, like other pursuits, fully on the basis of *free competition;* and the inexorable laws of free competition would control it; although operating indeed somewhat differently by reason of some peculiar conditions which such business presents.

These public offers were accepted whenever it was thought that a profit, present or future, was promised sufficient to justify the risk, and in this way the business began, and has been since prosecuted. It has, of course, been overdone as every business subjected to free competition is apt to be overdone. The sanguine expectations of men are seldom answered by results, and the consequence has been that the spectacle of roads built where there was not patronage sufficient to yield a return on the investment has been far more frequent than that of a failure to build where there was a sufficient patronage. Indeed, the latter condition is hardly known.

Many different causes have conspired to press forward the work. A single road connecting two considerable points immediately becomes a temptation to those just out of its reach, both laterally and at the terminals, to get to it, and extensions and branches immediately spring into existence. The people themselves want them for their business purposes, and construct them by forming new companies, or aid the existing companies to do it. Speculative promoters and contractors, in the hope of making a profit out of the job of construction, further stimulate extension. As the work has advanced it has been found that a little more construction would connect pre-existing lines, and promise a large through business. Systems begin to be formed, and then each system becomes anxious to secure the intervening territory by extending its arms in every direction. At the start the only competitors were other forms of land and water carriage. The former, consisting of teams and stages, were quickly and easily overcome. The latter, water carriage, was not greatly affected. Its natural advantages protected it. But as the roads began to multiply, competition followed between them, and as the existing business would be insufficient to support all, each would be driven for its existence, either to *create* new business, or further wrest from land carriers, or attempt a struggle against water transportation. Of course, success in none of these efforts could be had except by reduction in rates, or by the discovery and practice of economies.

If the above sketch of the progress of railway transportation in the United States, and of the causes which have shaped it be true, it must have followed as a consequence that the charges of transportation have been steadiiy diminishing. Should the fact be shown to be otherwise much doubt would justly be cast upon the correctness of the statement. But the fact is, notoriously, that such charges have

been constantly diminishing and they are now lower than in any country in the world; and it is probably true that the capital actually invested in them was, at the time of the passage of the anti-trust act, receiving a smaller annual return than capital invested in any other business, notwithstanding the risk to capital invested in railroads is far greater than that which attends many other investments.

If we were to look alone at the interest of that part of the public which requires and pays for the services of railroads the free competition above mentioned has been of great utility. They have obtained their commodity at a very low cost, much lower than anyone would, beforehand, have bargained to sell it. If we were to look at the interest of the *whole community*, it also has been benefited so far as free competition has prevented any reaping by railroads of profits larger than those made upon other ordinary investments; but outside of that, and so far as the fierce struggle has had the effect of making some investments valueless and reducing the entire income below the average rate, the whole community has suffered; and that part of it holding railroad investments has suffered most severely.

The reason why railroads are greater sufferers than other industries from the destructive effects of free competition is that the latter have several defences and protections against it while the former have but one. Manufacturers, for instance, of certain descriptions of goods, when there is a low price in consequence of an over supply, may hold their goods for another time and a better market, or, if the competition is so fierce that they feel unable to continue it, they may, at a sacrifice indeed, sell out and transfer their capital to some other quarter. This they can generally do, for their buildings and water or steam power have a value for many other purposes, and some other men with better advantages may think they can continue the business successfully; or they may come to an agreement with their com-

petitors to stop the warfare. This is possible only when all have come to the conclusion that they can no longer benefit themselves by a further struggle.

Of these defences the first is not open to a railroad. It cannot hold its goods for a better market. The provision for a certain amount of transportation has already been made and the expense fully incurred. All that is received is clear gain; that is to say, it will make the loss so much less, even if it fails to make a profit. Nor is the second any more open. The railroad owner cannot find any purchaser for his plant who may profitably employ it for some other purpose. It can be used only as a railroad.

The only resort open to railroads to save themselves from the effects of a ruinous competition is the third method, that of agreement among themselves to check and control it.

The importance of this consideration, and the circumstance that it is not generally fully comprehended and acknowledged is a sufficient reason for drawing the closest attention to it. In dealings in *physical commodities*(we mean those which can be produced to an unlimited extent, by the mere application of labor and capital) there is no *compulsion* either to sell or to buy. Purchasers and sellers are both *free*. If the purchaser is not satisfied with the price, he can withhold his stock for a better market, and he ordinarily does stop before he reaches the cost of the article. If the better market does not come, he may think it expedient to offer for cost, or even less than cost, but in the case of most commodities a moderate abatement of the price enables him to sell, for it must be remembered that there is competition here on both sides. If a good price is offered sellers compete to get it, if the sellers offer at a low price buyers rush to get the goods. *Market prices* are thus established which do not in general range through wide distances, and the loss of sellers, where they make one, is thus moderated. If for any reason the market remains low, they dimin-

ish production until it falls below the demand, when the competition is shifted to the other side and prices rise. The whole world is a possible buyer and a possible seller. The demand at certain prices is unlimited, and the manufactures of the United States would, if the prices were made to suit, go to the ends of the earth. Under these conditions, buyers and sellers being equally free, a certain degree of stability is *automatically* brought about, and though some may, in some years, make a loss, few are ruined. *Transportation by water*, at least ocean transportation, is subject to the same laws. Shippers and carriers are equally free. The shipping of the whole world may resort to every port. If freights at any particular port are high, vessels will flock thither; if low, they will seek other shores. Neither side will make an engagement except on terms which will promise a profit, except that sometimes a ship will take a cargo at a very low rate, or even go in ballast, in order to get to a better market.

The conditions in railway transportation are widely different. The *shippers* are for the most part free, and may withhold their goods for lower rates, but the *carriers* are not free. They are under a compulsion to sell their transportation day by day, or submit to a total loss of it. Whatever they get, and however much smaller than the expense of doing the business, is still so much gained which would otherwise be lost. Nor can they, like the manufacturers of commodities, curtail their production. They must go on producing, however unable to re-imburse themselves. Neither can they, by a small diminution of price, enlarge the demand, at least, immediately. The world is not open to them. The goods of Europe will not flow here for the fun of being carried. There is a certain amount of business to be done by all, and the struggle of each is to get as much as possible of that.

Under these circumstances it is too plain for argument that prices can never rise to any considerable

height above the living point. No combination would be able to effect that, for if the profits of carriage were very high the temptation to secure a larger share without being detected would triumph over the prudential fear of bringing on a destructive combination. It is equally certain that a ruinous competition must come unless avoided by faithfully kept agreement. It is in the last degree difficult to avoid it even by this means, but the certainty of ruin unless such a course is taken is a powerful incentive to good faith.

In describing as above the features of railroad competition we have sought to give its salient and controlling features. There are, indeed, important qualifications at all times operating which check the ruinous tendencies. To a limited extent, and with certain commodities, chiefly the great staples, a slight decrease in rates will draw out traffic awaiting transportation and enable cars to be filled, and a rise in the great centres of exportation of the price of such commodities, will sometimes furnish a volume of traffic greater than the combined facilities for moving it. And, besides this, the natural dread of doing business at less than cost is always strongly operative. But these are plainly insufficient to prevent one railroad from meeting any reduction of rates offered by a rival. The compulsion is absolute and can never be resisted.

These views do not depend on any abstract reasoning as to the nature of competition operating upon such conditions, although this would be enough to establish them, but they are confirmed by the unvarying results of actual experience. The history of railroad transportation proves that whenever a railroad depends for its support upon traffic upon which another railroad is in like manner dependent, and the competition thus engendered has continued for any considerable length of time, one competitor has either swallowed up the other, or, if both survive, it is under some *modus vivendi* established by agreement.

A reference to the present condition of railway transportation in England well illustrates and proves this. There the traffic furnished by a small territory is so large that many independent rival lines have grown up to satisfy the demand. They are in earnest competition with each other, and it is prosecuted by efforts to attract the traffic towards each, by the offering of superior facilities. But these rival lines have cost vast sums, have become firmly established, and pay regular and fair dividends. Any competition in *rates* would soon become war and imperil vast interests. The managers are so conscious of this danger that they do not *dare* to enter into any *such* competition, and by *conference* and *tacit agreement* the rates are fixed. The fear of the inevitable consequences of a struggle in rates is sufficient to secure an obedience to these tacit understandings. A very intelligent observer of the English system, Mr. Robert P. Porter, in a recently published letter (Boston Transcript, Oct. 4th, 1897), says:

"The general manager of one of the great English "railways said to me when in London the other "day: 'There is not much "pooling" or dividing "'traffic receipts now in England. Our own com- "'pany still maintains a few pooling arrangements, "'but they are not important.' The fact is, the "English railways have arrived at much the same re- "sults by an arrangement, or agreement, as to rates "and fares to be charged by competitive companies "running to the same points from the same termini. "Under these agreements, which appear to be abso- "lutely kept as to passenger traffic, the whole regular "traffic of the United Kingdom is practically pooled. "For example, there are four great railways compet- "ing for the traffic between London and Liverpool— "the London and Northwestern, the Midland, the "Great Northern and the Great Western. The Lon- "don and Northwestern is the shortest and most di-

"rect way, and, therefore, the fare is based on that "route. Between it and the Great Western there is "a difference of some forty miles, yet the fares on all "four roads are identically the same. A regular pool "once existed between these roads for the Liverpool "traffic, but when it had expired matters had ad- "justed themselves in a manner satisfactory to each "company, and the compact or agreement has been "substantially kept without the form of a pool. Of "course, if any of these four railways began to cut "rates, they would be met by the other companies, "until all had enough of such folly, and entered into "an actual agreement again. This, it should be re- "membered, they have a perfect legal right to do. "Thus we have here, and there are hundreds of similar "instances in England, a tacit agreement as to com- "petitive rates, namely, that each company shall se- "cure, by legitimate means, all the through traffic it "can, the rates of fare being similar at all competi- "tive points. Again, the distance between London "and Birmingham is 113 miles by the Northwestern "and $129\frac{1}{2}$ miles by the Great Western, yet both "charge the same and do the journey in the same "time. Meantime, the Great Western will soon open "a shorter route, which may lead to a reduction of "time, but certainly not to a reduction of fare."

From this survey of the action of competition in which it is, at one time, perceived to be the source of great benefits and, at others, of great mischiefs, it ought to be possible to discern the conditions under which it is beneficial and those under which it ceases to be such. If this could be done a long step would be taken towards the solution of the problem we have before us. We have already seen that the contestants in a competitive struggle may put an end to the strife by agreement, but also that it is possible that they may combine together by agreement, not to save themselves from ruin, but to make exactions from the public.

The desirable thing is to know when and under what circumstances a resort is beneficial as having the effect of preventing destructive strife without imposing undue exactions upon the public.

One answer may be promptly given to this question, although it may not be wholly satisfactory, that is, *whenever it is necessary;* and if it is asked, necessary to *what?* the answer is, necessary *in order to save useful life*, and it is not difficult to determine when such an exigency exists. If many are engaged as rivals in the production of the same article, the one having the fewest advantages will soon perceive that he cannot long carry on the struggle, and will retire and employ his capital and his energies in another field; and this is best both for him and the public, for the remaining contestants can easily and more cheaply supply the present demand. As the contest proceeds the next weakest will in like manner retire, and with the like advantage and the establishments and investments of the remaining rivals will be proportionately increased in order to make up for the losses in the sources of supply thus cut off. But the alternative of retiring becomes more and more difficult. The establishments soon become so large that a transfer of capital is impossible without heavy loss. Other expedients are resorted to, such as a temporary suspension of production; but this becomes more and more difficult, and the rival, or rivals, continuing in business keep the market fully supplied and the weaker party finds itself reduced to the alternatives either of sustaining a ruinous loss by a forced sale, or engaging in a last desperate attempt to overcome his remaining rivals. Under these circumstances he seeks a conference with his rivals, and is ready to put an end to the destructive competition either by an agreement not to sell below certain prices, or to sell out his establishment to them at a fair price, or to consolidate all together under a common ownership. Surely there is no public reason why either of these things should not

be permitted, and, so far as the public is concerned, it is indifferent which course is taken. If the contest should be continued bankruptcy would soon overtake the weakest of the competitors, and his establishment would find its only purchaser in one of the others. The inevitable end is the same whichever course is pursued; but if it is anticipated in either of the ways indicated, the weaker party and his creditors are saved from ruin. The trade was sufficient to fairly employ all the capital invested, and the bankruptcy and ruin of one of the parties, carrying down many others with him, would be a public misfortune. The consolidation of the business, although it removes immediate and direct competition, does not escape that which is indirect. If advantage were taken of the absence of rivalry to put up prices, it would either so check the demand as to disappoint the hope of increased profit, or, if increased profits were realized, other rivals pressed with competition in their own pursuits would come in to partake of them. What would be said to the suggestion of a *law* which should *compel* these last contestants in a fierce struggle for existence to continue the fight until there was but a single survivor, by denying the privilege of agreement in either of the above mentioned forms? And yet this is, in substance and effect, what the Anti-Trust Act is asserted by the appellants to be.

Voluntary and Involuntary Competition.

It will be observed that in the illustrations above given the competition is in every stage *voluntary*, and, so long as it is voluntary, it operates *automatically* to shut out from every industry any excess of capital invested in it, which would operate to reduce the returns below the general average, and to transfer capital to those fields where the profits are in excess of the average.

It may be asked why, if this operation thus proceeds automatically, all production does not fall into the hands of a few large proprietors. Such, indeed, is the tendency, and such would be the effect, except for the circumstance of the infinite variety in the articles of production, and in the unequal natural advantages of producers. Locality of demand, adaptedness of machinery, different degrees of skill in management, accessibility of materials—all of these furnish special advantages which enable small producers to carry on a limited trade, and release them from the pressure of the great rivals whose power is derived from the devotion of vast capital and skill to the production of a single thing. Where there is an enormous demand for the *same thing*, such for instance as sugar, it is nearly certain that the production will fall into a very few hands, or a single corporate hand.

Let us turn from instances of *voluntary* competition to those where it assumes a compulsory form, and of which the principal instance is that of railway transportation. Let it be supposed that several lines are competing for the same traffic. One may be decidedly weaker than the others and unable to engage in sharp competition. Its owners would like to retire from the field, and generally do so by effecting sales of their stock at reduced prices; but changing owners does not remove the problem. The new owners find their purchase anything but a prize. The capital cannot be transferred to a new employment. The investment can be used for a railroad alone. Nor can they stop producing while the business is unprofitable and save expenses until the season when the rivals have more than they can carry. The law obliges them to continue to produce their goods though they are unable to effect sales. They must go on until absolute inability to pay expenses compels the surrender of their worthless investment.

If it is the case of a road in excess of the public requirements, there is nothing to be regretted. The

building of it was a mistake, and it will bring nothing at the sale except the value of its materials. If, on the other hand, it is one really needed, and at times essential, a price will be paid for it by one of the rivals who may operate it with less expense in connection with its own line, and with a profit. But suppose the case of several rival lines, all of them much needed public facilities, and to support all of which there is a sufficient traffic at fair rates. The competition between them waxes fiercer and fiercer until the point is reached where there is no profit for the road possessing the least natural advantages. Can a word be said in defence of the proposition that public policy *requires* that this competition should proceed until it ends in the successive destruction of the weaker parties and the consequent loss of the most useful public facilities?

From this we venture to draw the conclusion that *competition is beneficial only where it is voluntary*. Such a thing as competition made compulsory *by law* is utterly abhorrent to every principle of public policy. What inducement would there be to industry if its fruits were commanded to be placed at the peril of a struggle, which, once begun, must continue until but one survivor is left? If individuals are not allowed to put an end by agreement to the strifes of competition, the law itself should do it by appointing to each his field of labor and fixing the reward he is to receive. Such a system would have at least some foundation in reason. It is what many men dream of under the name of socialism.

In all the ordinary industries competition is, of necessity, *voluntary*, inasmuch as the competitors are legally free to retire whenever they choose, though sometimes only at a loss which amounts to a public misfortune. Whether, in order to avoid such loss, the rivals may, in any and every case, put an end to the contest by agreement, is a question upon which the authorities may permit some debate, though there

is little room for any in reason; but, certainly, when the law itself does not permit a retirement from the business, it must permit the termination of strife by agreement. Otherwise, it would sanction a *compulsory competition*.

Those who look with disfavor upon such checks upon competition, generally base their views upon the notion that they are restraints upon the *natural* course of trade, and that it is necessary, or, at least, highly desirable, that what is called the *order of nature* should not be interfered with. What they understand by the *order of nature* is not very clear, but a just definition certainly would be that order which would follow, if men were left free to act as they chose, subject of course to the rules of morality, without interference by positive law. But the making of agreements for the conduct of business is as much in the order of nature as anything else. Wherever men encounter a difficulty or mischief which can be done away with only by mutual agreement, can anything be more natural than that they should make agreements for such purposes? They do it in a thousand cases to which there has never been a thought of objection, and why they should not do it in the one with which we are dealing, if good can thereby be accomplished, is not to be perceived. It is not the *prohibition*, but the *permission* of agreements which the argument from the *order of nature* supports.

It is not, however, our argument that men should be permitted under *all* circumstances to make such agreements as they please. We take only the moderate ground always sanctioned by the wisest judges, that *freedom of contract* is, *in general*, the best public policy. Some men will always be found who will abuse freedom, and make contracts of a mischievous public tendency. These should be declared illegal, and may justify penal enactments. The courts have a broad jurisdiction to inquire into and determine what

contracts are and what are not in conflict, with public policy.

It may be asked why the natural tendency of unrestrained competition in railway business to drive out the weaker rivals and bring about consolidated ownership has not had that actual effect. It has had that actual effect, and has, from the first, been operating to produce it. So far as such effect has not been fully produced, it has been owing to the operation of two restraining causes which themselves confirm the general statement.

The first is the fact that owing to geographical separation, and difference of relation to different markets, some roads have advantages which others cannot, at present, enjoy. But this is only to say that they are, *so far*, removed from the stress of competition; that is, that competition does not exist. The other is that two great and powerful adversaries, unable for any cause to enter into formal agreements, will from the mere sense of necessity, to a certain extent, *tacitly* adopt similar rates, and refrain, like two hostile nations, armed against each other, but dreading actual collision, from any course likely to plunge them into actual strife. But this, whatever it may be in appearance, is, in reality, agreement, and is as obnoxious to the spirit and policy of the law as the most formal agreement, if the latter is thus obnoxious.

But the effects of these two retarding influences are limited. In the progress of competition local lines are continually falling under the ownership and control of the large systems, and are thus brought within the range of the competitions in which the latter are engaged, and the same extensions and consolidations result in bringing water and railway transportation into rivalry, even when the lines are widely separated.

We do not mean to be understood as implying, or intimating, that the process of consolidation has been at all times the result of competition proceeding to the last extremity. Much of it has taken place from

a wholly different cause, namely, obvious convenience. A vast amount of the consolidation has consisted of purchases by main lines of branch and connecting lines. Between these, competition is not operative; but it has been found to be in the interest of the owners, as it is obviously in the public interest, that all the roads which serve to feed the traffic of a main line should be controlled by it, and the facilities of legislation have been amply extended to allow purchases and other forms of consolidation. The effects of competition to compel consolidation are, of course, felt only where the competition exists.

The extinction of competition by agreement has always been going on in the industrial world, and to the two principal ways in which it is done no sound lawyers, or thinkers, have ever suggested any objection. The first method is by forming co-partnerships. Nothing is more common than the union of rivals engaged in the same business under co-partnership forms, with no other purpose than that of putting an end to competition. But in cases where this cannot be well accomplished, owing to the number of the rivals and the magnitude of the investments, corporate organizations are resorted to. In what substantial respect do these differ from co-partnerships? What is the great American Sugar Refining Company but a union of the principal sugar refiners of the country to consolidate their business and extinguish competition among themselves? The State may refuse them the aid of corporate organization for such a purpose; but it should not, and, indeed, could not, constitutionally deny them the right to do the same things by co-partnership.

We have thus far described the necessary results which have flowed from the great leading fact that from the beginning railroad transportation has, by the deliberate choice of government, been committed to private enterprise acting under the stress of free competition, and thus converted from a public to a private

business. That it has been a prodigious stimulus to extension, cannot be doubted. Fair business enterprise, over-sanguine expectations, speculation, both honest and dishonest, have all been called into play, and the whole country has been traversed in every direction by a network of railroads, furnishing a public accommodation which certainly would not have been approached in extent had the states reserved the business to their own direct prosecution.

We have next to consider the *quality* of the service and the causes which have operated to bestow upon it whatever merit or other character it may possess, and how that has been, and is, affected by sharp competition.

The six main requisites of railway service and how they are affected by illegitimate competition.

An ideally perfect railroad service would be one in which a shipper was assured that he could deliver any amount, large or small, of merchandise at any point in the country at any time, present, or within any future time for which he is in the habit of making his business arrangements, destined for any other point, and have it delivered at its destination in safety and with dispatch, at a price, known beforehand, which would fairly reward the service and be no greater or less than that exacted from others in similar circumstances.

This would include the following requisites? (1) *Uniformity in rates.* (2) *Stability in rates.* (3) *Equality in rates.* (4) *Despatch and safety.* (5) *Ease and convenience*, effected by classification and publicity. (6) *Reasonable rates.*

That these are the main requirements is so immediately obvious that no words are needed to show it.

Among them we place *uniformity in rates* first, because it is preeminently entitled to that place. All the other requisites depend upon it largely, and some of them absolutely. It presents itself in two aspects: *First*, uniformity in the rates charged *by the same road* for services, which, though different in some respects, as being hauls of different kinds of goods, or on different parts of the line, are yet substantially the same service *in amount*. This sort of uniformity is enjoined by the Inter-State Commerce law, and is an object which may be gained by law. It is not this uniformity of which we now more particularly speak; but we mean uniformity of charge *by different and competing roads* for like hauls of like goods. We mean that it is an essential requisite, that while competition in the *quality of the service* should be active, yet that competition in rates should, *by some means or other*, be done away with, as being intrinsically the source of unendurable evils. No one of the other requisites is possible unless this is assured. Competition is simply the *negative* both of stability and equality. Change and inequality are its direct and inevitable consequences. Every transaction of any considerable amount becomes the subject of a special bargain, in which skill, dexterity, deceit and every form of unscrupulousness are brought into play. Large shippers seek from freight agents the lowest rates they can get. They represent that they can have certain very low rates from some rival line. The representation may be true or false. The railroad agent feels that he cannot afford to lose the traffic and offers a lower rate. The ignorant, truthful or unskilled shipper is at a great disadvantage, and pays a higher rate. For instance, a nominally regular rate is charged for carrying passengers. The ordinary passenger wishing to go from New York to Chicago, ignorant of the devices which may be resorted to, blindly pays the nominally regular fare of twenty dollars. A shrewder one having his family or companions, enabling him to make

up a group, offers fourteen dollars for ten tickets and the agent desirous of securing the large sum of $140, accepts the offer. Middlemen spring up and procure tickets in quantity and undersell the regular agents of the company. The principal instrumentality employed by the competing parties is soliciting agents, who besiege merchants, manufacturers and others controlling shipments. They become valuable in proportion to their success without much regard to the means they employ. Their own understanding of their duties — probably not very erroneous — is that they are to "get there." Of course nothing can be wanting to bring about perfect demoralization after such agencies are resorted to. The result is that there is absolutely nothing which can be called a rate, either for freight or passengers, and there is no remedy for it except consolidated control. Such a thing as different charges for the carriage of the same goods to or from the same market is a monstrosity which would make the business of life impossible. It nowhere exists, except in this country, and only here occasionally, as a consequence of a failure to keep agreements. In England it is prevented by pooling or by tacit agreement. On the continent the necessity of uniformity has forced the railroads of the principal nations and the nations themselves by a vastly extended combination, formed by agreements and supplemented by treaties, to do away with competition *in rates*.

The fourth requirement, that of *despatch* and *safety*, is also, though not entirely defeated, greatly obstructed and impaired by competition when it becomes intense and deadly. The course of traffic becomes irregular. The shipping public, finding rates greatly reduced, and not knowing how long they will remain so, presses its business upon the roads supposed, for the moment, to offer the lowest rates. Trains are multiplied and lengthened. The personal force of the roads is taxed for a time beyond its ability. The

occasions for delays and the opportunities for danger are multiplied; and, in addition, the diminished profits lead to a neglect of the tracks, bridges and equipment which will inevitably manifest itself in an increase of accidents. But nothing more than the suggestion is needed to show that disturbance and irregularity in traffic, bringing the unexpected along with it at every turn, is wholly inconsistent with despatch and safety.

The fifth requirement, that of *ease* and *convenience* in shipping is similarly obstructed by sharp competition. The instrumentalities upon the effectiveness of which it principally depends are facilities for the interchange of traffic and the classification of freight. Both these, from the nature of the case, are dependent, at every step, upon agreement. In the simple case of two connecting lines, neither of which is subjected to competition, if we may suppose a case which rarely if ever exists, there is, indeed, no obstacle to complete harmony; but where there are two rivals, each connecting at their terminals with another and the same road, there is an ever present inducement for one of the rivals to combine with the connecting road to secure secret advantages over its competitor. The Inter-state Commerce Act condemns, indeed, the extension of such advantages; but its requirements are apt to go for but little under the pressure of intense competition. If one competitor can throw obstacles in the way of another, it will, and there is no method which will be found effective for the removal of unfair and illegal preferences except that of removing the competition which is its cause.

The same is true of classification. The business of classification, as it stands between competing roads, should be fully understood. Without such understanding there can be no just comprehension of the questions involved in this action. Precision and some detail are therefore essential and will be excused.

We must begin with an accurate *definition* of the

thing itself. A classification of freight is the assignment of all the subjects of transportation, say thirty thousand, to a small number of classes varying in number in different areas where the conditions of transportation differ, with a view of assigning, in each district, a given rate to each class; such arrangement being not according to bulk, weight, value, risk, labor of handling, or any other single element of carriage, but made upon consideration of, and as a compromise between, these and other elements. This compels the carriage of many articles at less than cost, the loss being made up by the profit on other articles.

Classification, therefore, is only an incident of *rate making*. Its sole purpose is to enable shippers on the one hand and railroad managers on the other to know by a glance at the rate sheet what is to be charged for the carriage of particular goods. If nothing were charged, if all goods were carried at the public expense, there would be no occasion for a classification and there would be none.

And a strict observance, both of the classification and of the rates assigned to each class, is absolutely essential. If the classes should be disregarded or changed at pleasure, and goods in one class charged a rate different from the one assigned to the class, or particular articles taken at pleasure out of one class and put into another, the classification would be an empty and meaningless form, and so utterly useless that it would not be resorted to.

Classification, as thus explained, is so great a convenience, both to the public and the managers of railroad business, that if there were no such thing as competition, that is to say, if all roads were owned and operated by government, or by a single corporation, a resort to it would be necessary. The enormous labor and inconvenience of having a particular rate for each one of thirty thousand different subjects of transportation would compel it

The *presence* of competition *in rates* immediately renders classification, not indeed theoretically impossible, but absolutely useless, and so useless that it would never be, under that condition, resorted to. The two things are utterly hostile to each other, and can never co-exist. This should be clearly understood. Inasmuch as classification is simply a *part* of rate making, it never is and never has been attempted, except upon the assumption that when it is established it will be observed; and this means that the parties to it will charge the rates, and only the rates, fixed by it; and they are fixed only by a designation of the rate to be charged upon each class. Any notion that railroad managers ever did, or could, or that it would be of the slightest use or significance if they could, separate the various subjects of transportation into a small number of classes without fixing rates for each class, would be an utter illusion. But let us be sure of this, and take nothing for granted. In all competition the supreme object, which dominates all others, is *to get business;* and to this end the rates must be accommodated to the necessity. The soliciting agents of a road are instructed to secure it, either on any terms, or within certain named limits. They apply to a shipper of wheat and find that they can obtain a lot of 500,000 bushels from Chicago to New York at a certain rate and not otherwise, and they have reason to know, or think they have reason to know, that unless they take it at that rate, some other road will. It is lower than the published rate, lower also than the classified rate; but it is taken notwithstanding, because, otherwise, it is believed the business will be lost. The whole transaction is *secret*, and care may, or may not, be taken to exhibit a formal compliance with the law by charging, nominally, a rate equal to the published one, and agreeing for a *rebate*. It will be perceived that in order to gain the object, an article in one class will be placed in another class, or taken at some lower

rate than that of the class to which it belongs, as may be most convenient, that is to say, that the classification amounts to nothing. Under such circumstances, of course, no efforts will be made to bring about a classification, which all parties understand will be an empty form.

Classification, therefore, and *agreement on rates* are parts of the *same thing*, and necessarily imply each other. When agreement on rates is impossible, classification is impossible. When the representatives of railroad companies go into conference with a view to effecting classification, they do not say to each other, "Let us classify articles of transportation, without making rates, with a view to convenience and then compete, if we choose, on the rates at which we will carry the articles, and all the articles, in each class respectively." They know perfectly well that if competition in rates is left free to act it cannot be subjected to such, or any limits, and they would smile at a proposal to classify without agreeing on rates. All the classification ever known between competing railroads has been instituted by an attempt to agree upon rates, and, so far as effected, has consisted in an agreement on rates.

Uniformity in rates, therefore, is an essential condition of classification, and as *somebody must* classify, and none can classify except those who have the power to determine rates, the work must be done by the owners and operators of railroads, who alone have the power. Everywhere in the world this work has, so far, been done by them. We cite from what appears to be a credible authority a passage which shows that the constitution of the Prussian kingdom makes it one of the duties of the government to strive for the attainment of uniform railroad rates, and shows also how that uniformity is brought about without imposing government rates upon the railroad companies under private ownership.

"The federal constitution makes it the duty of the

" government to cause the German railroads to be " managed as a uniform network in the interests of " the general traffic. This phrase, 'as a uniform " network,' is an elastic one, and probably would " suffice to give the federal government most of the " powers it exercises; yet, nine articles of the con- " stitution are either wholly or in part devoted to the " subject of railroads, embracing matters pertaining " to construction, equipment, operation and repair. " These articles declare that the government shall " strive to induce a uniform system of regulations for " the operation of all German railroads, and a uniform " system of rates; that it shall strive to secure the " greatest possible reduction of rates, especially for " long hauls of articles supplying the wants of agri- " culture and of industry, such as coal, coke, wood, " ore, stone, salt, pig-iron, fertilizers, etc. In times " of distress and famine, the emperor, on the recom- " mendation of the railroad committee of the " Bundesrath, a standing committee required by the " federal constitution, may temporarily fix rates for " the transportation of the necessaries of life, pro- " vided that such a reduction shall not reduce rates " below those charged on the respective railroads for " the transportation of raw material. These constitu- " tional provisions have been well carried out, for the " German railroads *are* operated as a system, and " their system of rates and of regulations has develop- " ed a high degree of uniformity. The emperor has " not yet been called upon to exercise his special pre- " rogative during times of distress because the rail- " roads have voluntarily met the needs of such " times." (Annals of the American Academy of Political and Social Science for November, 1897, p. 81.)

The same Article from which the foregoing extract is taken also shows that all the great lines in a large part of Europe carrying international traffic are united for the same purpose by Associations among them-

selves, supplemented by treaties between the nations.

The last requirement, that of a reasonable reward, must of necessity be sacrificed by the loss of uniformity. The price will either be too high, or too low to furnish an adequate return on the capital.

THE DEVELOPMENT AND PROGRESS OF CO-OPERATION, AGREEMENT, AND TRAFFIC ASSOCIATIONS IN OUR RAILROAD SYSTEM.

It is an assured fact that wherever men are engaged in performing different parts of the same work they will *co-operate* in it, that is they will *agree* with each other, to the end that the work of each may be as little troublesome, and as effective as possible. Self-interest and benevolence here concur with each other; and it may with equal confidence be said that men will always under these circumstances agree, unless they are somehow prevented.

Accordingly, in the first stage of railroad transportations the railroads would co-operate with teams and stages by entering into mutual and joint arrangements, and when branches and extensions were constructed by independent companies, similar arrangements would be entered into with them. Of course no *through* passenger ticket could be sold, or *through* shipment of freight be made, without such agreement; and such a prodigious saving of expense and trouble, not only to passengers and shippers, but also to the carriers themselves, could be thus effected, that, as a matter of course, agreement would, and did, go, hand in hand, with railroad extension. This sort of agreement is that which subsists between *connecting* companies and it is universal, embracing every railroad, and many lines of water carriage, and covers a great variety of points, such as the establishment and division of joint rates, the furnishing of facilities for the trans-shipment and inter-change of traffic, the common use of each

other's tracks, stations, etc. Inasmuch as competition, the great obstacle to agreement, does not here exist, there is nothing to interfere with the complete extension of this form of co-operation.

When, however, competitive lines first sprang into existence other considerations came into play. It is presumable that they were not often, if ever, built in reliance upon competitive business alone, or chiefly. While competing, they would, at the same time, be drawing out new traffic from new territory, and the expectation would be that such new traffic, added to that which was the subject of competition, would afford patronage sufficient to sustain both lines. But expectations are apt to be over-sanguine, and it would generally be found that the profits of the original line were reduced below the point of satisfaction to the proprietors. The latter might seek to restore its fortunes by building new branches, or extensions, and thus calling out additional patronage. It must do this, or enter into a perilous conflict with its rival. The natural indisposition to take this dangerous step would suggest an effort for an agreement or understanding as to competitive rates. Probably no two railroads ever came into competition without an effort, at least, to come to an understanding upon competitive charges. Self interest, the universal guide, will always counsel the endeavor, unless one of the parties is convinced that he can easily overcome his competitor. The difficulty is in keeping the agreement. If self interest suggests a departure, the sense of honor will be found regretably weak. This would be so, even between two private individuals acting only for themselves. It is much more so when men are managing the interests of others, as well as their own. They have then to encounter, not only personal loss, but the complaints of their principals. The expectation that a departure from the agreement may not be discovered, the abundance of pretexts which may be urged in excuse or palliation, and

the inability to enforce the agreement, all combine to weaken it. If, under the agreement, one of the parties finds that he cannot even live, it will surely be broken. No man will deliberately lay down and die, because he has made an executory agreement which calls for death. If the sense of honor is weak, as unfortunately it often is, the agreement will be broken even to gain advantages.

Every breach of such agreements, of course, involves a renewal of war. Such breach means that the violating party will not keep the peace, and the other is obliged to accept war whether he wishes it or not. It now becomes war to the death, and by every means known to war, and, of course, with the necessary accompaniment of demoralization to the whole business, as detrimental to public interests as to those of the contending parties, and involving even the raising of the passions. But war, from the nature of the case, cannot be perpetual. It must, at some time, end, either in the bankruptcy and consequent paralysis of one of the belligerents, in which case his road passes into the control of the conqueror, or in a new agreement in more solemn form, and with new and, presumably, better, guaranties. It must now be the care of the victor even to secure a living to his victim, for he knows that any agreement which failed in this would be wholly abortive. It has become a maxim among railroad operators that no other agreements will be effectual for any purpose. The first thing is to make concessions which will enable the weaker party to secure traffic enough to live. If this cannot be done without diminishing too much the profits of the stronger, then the weaker must die.

In obedience to the causes and influences above mentioned, agreements, kept with varying degrees of fidelity, or rather broken in varying degrees of frequency, have gone hand in hand with competition from the moment when competition appeared. This has been the observed fact; and it is the necessary

fact. As competition has extended, agreements, designed to prevent its ruinous consequences, and resulting either in the surrender, for a price, of the weaker to the stronger competitors, or in concessions for prolonging the life of the former, have also been extended. The breach of them has been followed by demoralizing wars as damaging to public interests as to those of the contending parties; and the wars have terminated, as war always does, either in surrender, or in new agreements. The scope of the agreements has widened with the widening of competition, until they have come to embrace the traffic of great trunk lines controlling the transportation of great tracts of territory. Indeed, it would be true to say that agreements relating to *competitive* traffic have advanced side by side with the increase of such traffic, just as agreements relating to connecting traffic have gone along with that business. And it would also be entirely true to say that whatever of uniformity, stability and equality in rates, ease and convenience in shipping—indeed, whatever of excellence the railroad service may have exhibited in any respect, is largely due to agreement between competitive lines—and that nearly everything in the shape of instability, inequality, confusion and demoralization has sprung up in the absence or failure of agreement, and is strictly imputable to such absence, or failure. These agreements have not been wholly ineffectual, as is said, or intimated, in the opinion in the Trans-Missouri case. They have been, in the main, effectual. Though broken in multitudes of instances and the breaches always followed by war, still the condition of agreement has been the rule, and war the exception.

The last form which agreements of this character reached in their progress prior to the Inter-state Commerce Law, was that of *pooling*, by which either the traffic was divided beforehand between the rivals in agreed proportions, or a similar division made of the money receipts. Such a resort could, from its

nature, be made acceptable only in the last extremity, and after failure to enforce the observance of agreed rates. It compels the strong rivals to abate from their own estimate of their capacities and consent to award business to roads which could not, in a protracted struggle, vindicate their right to it.

A view of public policy, now widely thought to have been erroneous, led to the introduction into the Inter-state Commerce Act of a prohibition of this form of agreement between competing railroads, and the effect of this and other provisions of the same law was to subject the whole business of railroad transportation to vastly increased difficulties which are next to be considered.

The Inter-State Commerce Law and Its Effects.

We have already seen that the original policy in this country of making the business of railroads free to all, of necessity made it a *competitive* business. This was, of course, the *intention*, but, at the time, the pre-eminent importance of uniformity and equality in rates was not foreseen. In its early stages the business of transportation amounted to but a small fraction of its present magnitude and had been entirely in the hands of private carriers by land and water. The importance of uniformity and equality not being so obvious, and there being no methods of state action by which they could be secured, there was no thought of attempting to secure them. The desirability of securing rates reasonably low was, of course, obvious; but it was rightly supposed that this would be brought about in the same manner as in other things, by leaving the business open to competition.

With the progress of railroad extension, however, the need of stability, equality, and uniformity in rates

became increasingly, and, at last, overwhelmingly, apparent, and the lack of them equally so. Under competitive conditions this was impossible except when brought about by agreement, and the necessities of competition, whenever conflicts broke out, dominated every other interest.

The consequence was a host of conditions—all thought to be mischievous, and some of them really so. At times there would be no rate at all, and no one could tell, even for the morrow, what to expect. The most powerful shippers had the advantage, and could crush rivalry simply by the better rates they were able to command. The grossest favoritism was suspected, and often upon sufficient grounds. Long hauls were made at lower prices than short ones, and though there were often found reasons for this, there was sometimes a lack of sufficient reason. But the loudest and most just complaint was of *inequality*. The most skilfull, the most powerful and the most unscrupulous shippers had a constant advantage. There was complaint of charges as being unreasonably high; but this charge was really grounded upon the inequality. Where more is exacted from one shipper than from another, the former not unreasonably thinks that the charge imposed upon him is excessive, rather than that allowed to the other is too low.

The Inter-state Commerce Law of Feb. 4th, 1897 was the fruit of the loud public clamor. This act, admirable in its main purposes, and excellent in many of its provisions, was yet framed without sufficient regard to some necessary incidents of railway transportation and without sufficient reflection upon what could, and what could not, be accomplished by legislative enactments. Its framers aimed to secure equality, uniformity and stability in rates, but failed to see that this could be fully and permanently established only by those who have the power to fix rates, that is, the *owners;* and that if the government wished to accomplish this end by its own action, it must make itself the

owner. They required uniform charges for the same service, publication of rates, public notice of any change, and forbade any greater, or less charge for any service than the published rates, and supposed that railroads left under the stress of the fiercest competition would be able to obey those requirements. This expectation would not have been unreasonable, *provided* the roads were left to the free exercise of the means absolutely essential to enable them to obey, that is the power to *agree* with each other as to rates and to contrive the means to make their agreements effectual. But they prohibited, at the same time, the only form of agreement which had as yet been found fully effective, that is, the pooling agreement.

That Congress *expected* uniformity and equality in rates to flow as a consequence of the legislation cannot be doubted. These were the main objects it had in view. And we can hardly suppose it to have been so ignorant of the necessary conditions under which the law was to operate as to think that these ends could be reached unless *some* agreement was effected as to rates. Deadly competition, at that time prevented only by pooling agreements, would immediately spring up, unless such agreements were replaced by others not prohibited. If all the competitive lines should frame, file and publish schedules of rates as required by the law, and without communication with each other, the schedules would not agree, and the lines fixing the higher rates would at once perceive that the bulk of the traffic would flow to their rivals who had underbid them. Their only alternative would be (if they obeyed the law) to at once frame and file lower rates; and these would be put at a point supposed to be sufficient to draw traffic. The others, finding themselves outbid, would be compelled to file and publish new and still lower ones, until the point was reached, and probably passed, which would leave any profit. But inequality would still subsist and the bitter alternatives would be either to obey the

law and lose the traffic, and die then and there, or resort to secret and unlawful competition and make the best bargains possible, from day to day, with each shipper. It is not open to doubt which of these alternatives would be accepted. To suppose that law will be obeyed where the consequence of obedience is the certain ruin of property amounting to millions in value, and when it can without certain detection and punishment be evaded, is an illusion which can hardly be imputed to intelligent men. The consequence would be that one of the rivals would disregard its published rates and make secret bargains, and the rest would immediately follow.

All this being apparent to the companies, as soon as it became probable that the Inter-state Commerce bill would become a law, and long before it became such, they began diligently the work of *agreeing* upon rate sheets to be filed This was a work of difficulty; although the difficulty was diminished by the circumstance that uniformity of rates, more or less faithfully observed, already existed as the fruit of agreement; and thus agreements between the principal competitive lines were reached before the passage of the act, and schedules were made, filed and published within the prescribed time thereafter. This framing and filing of rates by concert was itself a new agreement, and, inasmuch as it was not to be expected that any of the parties would willingly make an *open* departure from the agreement, by filing different rate sheets, and as secret departures were made criminal, much hope was entertained for permanent uniformity.

The result, however, was similar to what had many times before happened in the case of agreements, other than pooling. When one of the parties found that the rates agreed upon and published were not enough to secure a living, freight was secretly taken at less rates. This could not long be concealed from the other parties. The course of shipments speedily reveals to a practiced eye any changes in actual

charges; and, upon strongly confirmed suspicions of a departure by one road, similar departures were made by others in order to retain patronage. The published rates became at once nominal, and peace was displaced by ruinous war.

Of course no company, perceiving that it was underbid, could defend itself by *publishing* lower rates and adhering to those. The mere publication would furnish the unscrupulous rival with the very information needed in order to carry on secret competition with the greatest facility. It would know the precise rate which it had to underbid. If one competitor employs the weapon of secret competition, the others must, or retire from the field. The result was that the whole competition became secret, but now with very grave consequences of another character. What before the Inter-state Commerce law was innocent, now became a crime. The published rates were not observed, and men of the highest character for integrity were driven into dishonest and criminal conduct. They shrunk from direct personal guilt; but the effective instrumentalities were familiar. These consisted in the employment of soliciting agents with no other instructions than to get the traffic. The rates named in bills of lading might be the published ones; but a secret rebate, or some other concealed concession, would attend them. Henceforth all uniformity and equality—the very objects sought by the law—were at an end. Criminal violations of law rapidly increased and threatened to become universal. The law, itself, furnished no safeguard against them. It was of no utility for honorable railroad officers to complain and seek to put the District Attorney in motion. They could furnish him with no legal evidence, and when he set the grand jury at work, witnesses refused to testify, and invoked the constitutional safeguards. In short, the effect of the law was not to secure uniformity or equality, but to make both impossible, and to add an abounding crop of misdemeanors,

dishonest concealments, perjuries and abortive efforts at punishment.

The present agreement grew out of this hideous condition of things. It was the effort of honorable men to enable themselves to carry on the most necessary of all businesses without ruin to the property employed, and without crime. The situation was unendurable, and demanded an earnest effort to discover whether some agreement, other than pooling, could not be contrived which could be enforced, and which would be effective. Whether the one actually devised will be effective, if it should be sustained, cannot be absolutely affirmed. It has not as yet been fully tried; but there is no objection to it of a legal nature which, upon any principle heretofore declared, can be sustained. Its object is not in any degree to create a monopoly, or raise rates; not, in any degree, to suppress, or check, competition, other than secret and illegal competition. It punishes no conduct except *criminal* conduct. It seeks no other end than to maintain and enforce the observance of the Inter-state Commerce Law, and to secure the stability, uniformity and equality, which are the chief objects of that law.

But this must not be left to assertion. It must be shown by a scrutiny of the agreement.

The Present Agreement, Its Provisions and Effect.

Its objects, as declared in its preamble, are, in brief, to aid in fulfilling the purposes of the Inter-state Commerce Act, to co-operate for the establishment of reasonable and just rates, fares, rules and regulations on State and Inter-state traffic, to prevent unjust discrimination, to secure the reduction and concentra-

tions of agencies, and the introduction of economies in the conduct of the freight and passenger business.

So far as rules and regulations are concerned, nothing need be said. No one will question the utility of an organization of companies engaged in a business of such vast extent, in which the action of the various parts are so inter-dependent, for the reduction of the conduct of the business to simplicity and order by subjecting it to reasonable rules.

It is only those provisions which relate to the *rates upon competitive traffic* which it is material to consider. The scheme which these are designed to carry into effect is extremely simple. It embraced the following principal features:

FIRST.—It starts with the assumption, admitted on this hearing, that the schedules of rates already framed, filed with the Inter-state Commerce Commission, and published by the several parties, are reasonable and just, and binds the parties to observe the same until they are changed. (Art. VII, Sec. 1.)

SECOND.—It provides two methods by which any rate thus agreed to may be changed. (1) By the action of the Board of Managers of the Association, upon which authority to that end is conferred. This Board may act on its own motion, or upon the application of any member of the Association. The change may be general, that is, one affecting the traffic of all the lines, or it may be confined to one or more roads. (Art. VII, Sec. 2). (2) If any member of the Association wishes to change a rate it may apply to the Board of Managers for that purpose, and if the application is unsuccessful and the member still wishes to make it on its own road, it is at full liberty to do so; but as this means, or may mean, that such company designs to start a competition in rates, it must give notice of this to the managers, so that they may take measures to meet it. This notice is effected by requir-

ing that the company intending the change should make it by a resolution of its Board of Directors, a copy of which is to be sent to the Board of Managers; and the change does not become effective until thirty days thereafter. (Art. VII, Sec. 2). Unless this restraint for thirty days, designed solely to prevent *secret* and *illegal* competition *in rates*, and to compel an observance of the Inter-state Commerce Law, is to be regarded as restraining competition, so as to *restrain trade*, there is no *appearance* even of a restraint of trade anywhere in the agreement.

THIRD.—The agreement is enforced by requiring from each company an original deposit of five thousand dollars, and such further monthly payments as the Board of Managers may determine, proportioned to the company's business, and by imposing a forfeit upon any offending company, not exceeding five thousand dollars, which fine is charged to the account of the offending company, and such company is required to keep its account good. The expenses of the Association are also paid from the same fund, and, at the termination of the agreement, what remains is to be divided among its members. (Articles XVI and XVII.)

THIRD.—The powers of the Association are vested in three bodies: (1) A Board of Managers, which has the principal authority in relation to rates, and is composed of nine members, one named by each of the through competitive *lines* or *systems*, each of which may embrace many different companies (Art. 4, Sec. 1); (2) A Board of Control, consisting of the Presidents of all the companies; but no system is allowed more than three votes in the aggregate; (3) A Board of Arbitration, composed of three disinterested persons selected by the Board of Control.

The above description sufficiently discloses the gen-

eral scheme of the agreement: but some few observations are necessary to explain its practical operation:

1. If any company is dissatisfied with the action of the Managers on *rates* and *fares*, except *differentials* (which will be subsequently explained), and does not determine to take separate action, it may appeal to the Board of Control (Art. III., Sec. 7).

2. If any member of the Association chooses to exercise its own pleasure as to whether it will abide by the agreed rates, which, as we have seen, it may do, without abandoning the Association, or subjecting itself to any penalty, and enter into competition in rates, it then becomes necessary to determine what action the others will take. Any individual member may, of course, meet this action in its own way by changing rates in the same manner; but if it desires the concurrence of the others, it may invoke the action of the Managers, and in that case, or even on their own motion, the Managers may proceed to determine what action shall be taken, and it is made their duty, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. So, also, if some carriers, railroad or water, not members of the Association, challenge competition with its members, it lies with the Board of Managers to determine how this competition is to be met.

All this, it will be perceived, is designed, when war breaks out, to prevent it from becoming general and ruinous, and to limit the field of hostilities.

3. This being an agreement designed to prevent its members from slaughtering each other, it is a fundamental notion that all shall have a fair chance for life according to their several and respective abilities. But experience, with its shifting conditions, might show that, in its effects, it was operating so as to deprive some member of the power to sustain itself. The traffic might be found to be flowing differently from what was expected. Under such circumstances the imperilled member would be compelled to exercise its privilege to renew competition in rates unless it could induce a concession on the part of the others. Such a condition may be met in a variety of ways. As all particular soliciting agencies (the fertile source of dishonest and mischievous competition) are abolished by the agreement, except with the approval of the managers (Art. XII.), they may allow the complaining company to have, under their supervision, soliciting agents, and this may suffice; or, they may instruct the joint agencies, which they have power to establish, (Art. XI.) to direct traffic, otherwise undestined, to such company; or, they may permit it to reduce rates for its own line to such an extent as to draw an increased traffic, which is what is called the allowance of a *differential.*

This provision it will be observed, is purely subsidiary to that main feature of the agreement designed to prevent *secret* and *unlawful* competition in *rates.* It must be born constantly in mind that this is the only competition sought to be prevented. *Open* competition upon every point, even upon rates, is in no manner prevented. But no agreement designed to prevent *secret* and *unlawful* competition can be really effective which does not furnish the weaker roads with some reasonable assurance that it is to their *interest* to accept it, that is, that they will be better off, in the long run, by accepting it than by taking their chances in a life and death struggle. It is this *assurance* which it is the object of this provision to afford. It assumes,

what must necessarily be assumed, that joining in the agreement means life and not death, and that there is traffic enough to enable all to live, and that, in order to secure life, there is no other method than that of selecting the most disinterested agency procurable, which shall from time to time determine, under the shifting conditions, how much is necessary to life, when one road is gaining, and another losing, traffic.

So far as respects all forms and modes of competition, save one, the agreement saves and cherishes competition. The improvement of tracks and equipment, increase of facilties, safety and dispatch in the conduct of the service are all encouraged. The more these qualities are exhibited by every line, the larger the traffic it gains, and all these increased rewards are its own. It is competition *in rates* only which is aimed at; and this is not *forbidden*, directly or indirectly. Every company is left at liberty to engage in it. The existence of such competition is indeed regarded as a savage anomaly which ought not to exist, and the effort is made to repress it, not by prohibition, but by *doing away with the occasion for it*, by establishing *uniform rates* and giving to each company which may happen to find that these rates are not sufficient to enable it to get a living business a chance to ask for concessions which will compensate for its disadvantages and enable it to obtain more of the traffic. If any company prefers not to accept this opportunity, but to start a competitive strife in rates, it is at liberty to do so; but, it being well known that this strife, unless regulated, will at once become a *secret*, dishonest, and unlawful competition, a provision is made *regulating* it and requiring it to be *open*, *declared*, *honest*, and *legal*. A temporary adherence to agreed rates is indispensable to this, and such adherence for the period of not exceeding thirty days is made obligatory.

If the above is a just description of the agreement no other question can be made upon it than this: Is

an agreement designed to convert, and necessary in order to convert, competition in railroad rates from utter and destructive and lawless savagery into order, peace and legality, a *restraint upon trade* which Congress *intended* to condemn and punish as a *criminal offence?*

But the functions, which agreements of which the one in question, is an example, cannot be fully comprehended until we clearly understand *the connection and relations between railway competition and manufacturing and commercial competition.*

Every one will recognize the fact that competition is everywhere present in all the industrial pursuits of life. The moment men abandon savage conditions and engage in industry, they are in competition with each other, and the competition springs up, not only between individuals, but between communities. Nor is it limited to communities of the same nation; but, to such a degree have all parts of the world been brought into easy communication with each other, that industrial strife arises and grows more and more intense between nations. Manufacturers and merchants in different cities and towns on the line of the same railroad are dependant, both for the supply of materials and the sale of products, on the same market, and thus come into competition as communities. The same thing is true of manufacturers and merchants in communities situated on different roads. The same is true of producers and consumers of different nations. America and Russia are competitors in supplying the world with petroleum. The wheat growers of India, Russia, South America and the United States are in direct competition.

Inasmuch as the competition compels the rivals to avail themselves of every advantage they can gain, the matter of rates for transportation becomes a highly important and, indeed, a controlling feature. Take the case of two manufacturers of the same article in the same place. If one can obtain better rates than

the other, he can reduce the profits of his rival, and even crush him. Consider the enormous and inexcusable injustice of this. The defeated party might be the most skillful, the most industrious and energetic, and, therefore, entitled to prevail in the struggle. He finds himself defeated, and perhaps ruined, not by the superior merits of his adversary, but by *the interposition and aid of a party engaged in the performance of a public function*, who ought to have preserved the most rigid neutrality. Take the case of two cities situated at similar distances from a railroad centre with which they are connected by branches respectively. Let it be supposed that the merchants and manufacturers in one succeed in obtaining an advantage in railroad rates to and from a distant market upon which both are dependant for purchases and sales. A whole community may be ruined; and the instrumentality through which the ruin has been effected is a *governmental power committed to private hands*, which should have been scrupulously neutral.

The neutrality—*the absolute neutrality*—of railroads in all the competitions of men is a fundamental axiom of state policy from which no departure should ever be permitted. This neutrality means *uniformity in rates*, and can never be otherwise preserved. Men compelled to strive with each other in the thousand competitions of life must have the right to equal rules secured to them in some form. A denial of it, and especially a denial by government, would be an atrocity.

These mischievous consequences of the combination of railway and commercial competition, inevitable when the former is left unregulated, were among the principal causes which led to the enactment of the Interstate Commerce Law. That law proceeded upon the theory that individuals and communities, in the race for supremacy, should not be subjected to discrimination on the part of carriers; that the power to put up, or pull down, so clearly possessed by the great

carriers, and supposed to be so often exerted, should be no longer wielded, so far as it could be prevented. *Natural* advantages, such as felicity of situation, superior enterprise, skill and industry, it was neither possible, nor desirable, to take away; but artificial and arbitrary advantages offered by those engaged in the performance of a function essentially public was justly viewed as mischievous and unjust in the highest degree. If government itself had retained in its own hands the actual performance of this service, no such advantages would be permitted. It was thought that in entrusting this service to the hands of private individuals they should, so far as was possible, be precluded from making such a use of it. They could not be thus precluded except by being required to establish and adhere to *uniform rates*.

There were several ways which might be suggested for bringing these about. Government ownership, were such a thing possible, would be one. The government would then fix rates according to some scheme of justice and equality, and make them *permanent*, and thus limit competition to the just arena of natural advantages by destroying it elsewhere. This, however, was not to be thought of. Besides other insuperable obstacles, no ownership, except that of *all* railways by the United States, would be effective; and the United States had no power to acquire the ownership. It could do no more than to control *inter-state* transportation.

Another method has often been suggested, and in some instances attempted by particular states, and that is to *fix uniform rates* by *legislative enactment*; but no enlightened government, clothed even with absolute power, has ever attempted it. That it could be done under a *constitutional* government like ours seems unthinkable. This is a *power of ownership*, and can be exercised only by the owner. No railroad subjected to free competition, as all of ours are, can help carrying at all times some, and very often enormous,

amounts of goods at less than cost. Its own view of its own interest may advise it to do this. But no power, except that of an absolute tyrant, can compel a man to perform a service for others at less than cost and against his will.

We have said that no enlightened government has ever attempted this. We do not forget that in the opinion in the case of Munn *vs.* Illinois, a single instance of an attempt by the British Parliament to fix the rates for the carriage of goods, and another by a municipal ordinance of the City of Washington to establish charges for hackmen, were referred to in order to support the proposition, not necessary to the decision, that the fixing of rates was a proper exercise of legislative power; and we admit it to be practically true that a power to fix railroad rates involves the power to compel the carriage of large quantities of freight for less than cost. But these are no real exceptions to the statement that no enlightened government has ever adopted such a measure. The British statutes referred to were never executed, and were subsequently repealed with the penitential confession that they were not enlightened exertions of legislative powers. (See the repealing Act in the Appendix). The municipal ordinance referred to was entirely defensible as an exercise of the *police* power to prevent extortion and imposition upon the unwary and necessitous. If popular prejudice and misconception, tempted by false representations, have succeeded in some states in inducing the assumption of a legislative power to fix rates, the error has not yet affected the action of Congress; but it is not a comfortable reflection that the fundamental rights of property should be better protected by a legislature like the British Parliament clothed with absolute power, than by those whose power is restricted by written constitutions declaring that no men shall be injured in person or property without due process of law.

A third method was entirely within the power of

Congress, but would be only partially effective even if it could be enforced. This was to directly prohibit discrimination and require similar services under similar circumstances to be rendered for the same rates. This would be effective to prevent discrimination *by any particular road*, but would not secure the same charges by different roads for similar services. This could not be done without destroying competition in rates, which it is impossible for a legislature to destroy so long as private ownership subsists, and even this could be made operative by Congress only in respect to inter-state commerce.

This method, however, being all that was practicable, was put in force by the following clauses of the Inter-state Commerce Act which constitute the substance of the whole enactment, its other provisions being, in the main, subsidiary only.

"Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or

locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business.

"Sec. 4. That it shall not be lawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for transportation of passengers or property, and the Commission may from time to time prescribe the extent to which said designated common carrier may be relieved from the operation of this section of this Act."

It has been shown above that *uniformity in rates*, which Congress has justly deemed so essential, and has sought to bring about by most stringent enact-

ments, operating through the field of its limited jurisdiction, is just as important in the case of different *competing* roads, as in the case of a single line. To effect this is a function of *regulation*, and of regulation of momentous importance. There should be *some* agency *somewhere* competent to discharge it, and able to discharge it. The railroad companies do not, in general, initiate this participation in the competitions of other business. It is brought about for the most part by the efforts of their patrons. But, by whomsoever brought about, it should be prevented. It can be prevented only by establishing *uniformity in rates*, by which we mean, not merely the *same* rates where all the conditions are the same, but corresponding rates where the conditions are different.

And here comes into distinct view the true and important feature of the Association under notice. *It is an institution for the regulation of transportation business in those respects where the State, either from lack of jurisdiction, or because it deemed that the regulation could be best devised and administered by the railroad systems themselves, has chosen not to regulate it.* And while the agreement contemplates regulation generally, yet the end which it regards as of principal importance is the securing of *uniformity in rates.*

How it accomplishes this, its principal work, and how it is calculated to secure, and does secure, the neutrality of railroads in the competitions of business, should be shown by giving illustrations of its daily work.

It has a building with extensive offices and a large array of officials and clerks. These embrace those who, by knowledge, skill, and long experience in the actual business of railroad transportation, have become the most accomplished experts in that business. Let it be supposed that there are manufactories of wagons, or chemicals, or any other article, in Michigan, long established and carrying on a prosperous trade, and with New York and Philadelphia as the principal markets. Another man or company

contemplates the establishment of a similar factory in Indiana for the same markets, and one of the important, probably the most important, thing for him to know is what rates he can obtain for the shipment of his product to market. He goes to a railroad company and informs it that if it can give him a certain rate, which he knows to be lower than the Michigan makers enjoy, he will be able to supply it with a large traffic. If there were no regulating agency governing the action of the roads, the company thus applied to, tempted by the prospect of business, would grant the rate and the manufactory might be started. Very soon the Indiana manufacturers would find themselves undersold and would not be long employed in ascertaining the cause. They would go at once to the line employed by them, give information that rivals in another State were obtaining better rates and insist upon a reduction for themselves. The company would at once see that such a reduction was necessary in order to enable it to retain that part of its business, and would grant perhaps a lower one, and thus the railroads become the participants, which they ought never to be, in the competitions of their patrons. But under the agreement with which we are dealing such an affair would receive a different treatment. The railroad company in Indiana on receiving the request, if it desired to grant it, would communicate with the Joint Traffic Association and inquire whether there was any objection. The proper officer of that association would at once communicate with the Michigan office, and with other roads carrying similar products to market, and inquire whether there was any objection. These roads would communicate with their patrons and these would object, or, rather, say they had no objection, provided a corresponding reduction were granted to them. The matter must then be submitted to the Board, which contains representatives of every railroad interest, and consequently representatives of the interests of all the

rival manufacturers, and will not be decided in favor of any particular manufacturer. If any change be made it will be a *uniform* change.

And the question will be decided upon the true grounds of fairness and justice. This will be so because it is for the *interest* of all the roads in the Association that it should be so. When we reflect that such cases are multitudinous and present themselves in every variety of shape, we must see that permanent and just rules alone enable the work to be done. No favoritism can be shown one class of merchants represented by one road, for its rival, which represents the rival merchants, has a representation on the Board. It may be suggested that the question would be likely to be settled in the interests of the railroad companies. That may be; and if their interest were in any way hostile to those of their patrons there would be something to think about; but there is not. The owners of railroads well know the conditions of their own prosperity, and that railroad business *generally* is not promoted by high rates; and are never slow to reduce a rate if thereby they can largely increase the aggregate amount of business.

It is well known that the rates on the shipment of the great staples from the West to the seaboard are fixed by the united action of the railroads, at certain sums. Whoever has the power of determining these may transfer the sceptre of commerce from, or to New York, or Philadelphia, or Baltimore. A mere trifle of a change would suffice. The merchants of New York are now clamoring that Baltimore is favored; but if the judgment of all the merchants in all the cities were taken as to the most competent, intelligent, and just tribunal to determine the question, it would be in favor of the tribunal with which the decision now rests.

We thus perceive that the main purpose of the agreement we are considering is identical with that of the Interstate Commerce law, a purpose which

that law was unable to accomplish, except to a very limited extent, in consequence of the limitations of Congressional jurisdiction. Most of the industries and interests of life when they assume great magnitude need *regulation*, which must be provided either by law or private effort, or by both. The great railroad transportation business needed uniformity in rates, and the efforts of the companies had been, prior to the law, insufficient to bring it about. Congress supplemented these by enacting the law, but was unable to accomplish the whole work. The agreement under notice is a further private effort toward the same end. What a strange policy to say that proper and necessary regulation, when brought about by law, is a blessing; but when effected by the voluntary action of individuals in those cases which the law cannot reach, is a crime!

IV.—The foregoing statement of the growth of our system of railway transportation, and the way in which it is affected by the unrestrained competition to which it has been intentionally subjected from the beginning, and the regulative action which the railroads have found it necessary to take by means of agreements and associations, has, in order that the attention might not be continually diverted, been drawn up in untechnical form and accompanied with little reference to particular proofs.

All the matters of fact contained in it are, however, fully substantiated:

1. By the very nature of the case. All can see that unrestrained competition acting upon the conditions which the railway system presents must necessarily lead to the results therein set forth.

2. The leading features of a business so universal, and so plainly under the observation of every one, and so frequently brought before judicial observation, possess that *notoriety* which requires courts to take judicial notice of them.

3. But neither of the above modes of authenticity need to be relied upon here. All the substantial facts relating to the origin and growth of the system, the action upon it of unrestrained competition, the mischiefs which that competition has brought about, the methods which have been naturally and necessarily employed to correct such mischief by voluntary agreements, the causes which, after the enactment of the Inter-state Commerce Law, made prior agreements ineffectual, the shaping of the agreement now before the Court in such manner as to meet the new exigencies created by that law, and the actual intent of the parties in framing it, are set forth in the affirmative parts of the principal answer, and are admitted by the setting down of the cause to be heard upon bill and answer. (Answer.—Paragraphs XIII. to XXII., inclusive.)

4. If further illustration were needed of the magnitude of the mischiefs brought about by unrestrained competition, of the impossibility of checking and preventing them in any other way than by mutual understanding and agreement between the railway lines, of the efficacy of that method, and of the necessity for *voluntary self-regulation* through co-operative agreement and association, it will be found in abundance in the often-repeated declarations of the Inter-state Commerce Commission, the regulating body created by Congress itself, which fully show that the system of government regulation is wholly insufficient to bring

about the beneficial results for which it was established, unless it is supplemented by voluntary and concerted agreement among the railroads themselves. Among these declarations the following are referred to, and submitted to the attentive consideration of the Court:

"To make railroads of the greatest possible ser-
"vice to the country, contract relations would be
"essential, because there would be need to be joint
"tariffs, joint running arrangements, an inter-change
"of cars and a giving of credit to a large extent,
"some of which were obviously beyond the reach of
"compulsory legislation, and even if they were not,
"could be best settled and all the incidents and quali-
"fications fixed by the voluntary action of the parties
"in control of the roads respectively.

"Agreements upon these and kindred matters
"became, therefore, a settled policy, and short, inde-
"pendent lines of road seemed to lose their identity
"and to become parts of great trunk lines, and asso-
"ciations were formed which embraced all the mana-
"gers of roads in a State or section of the country.
"To these associations were remitted many questions
"of common interest, including such as are above re-
"ferred to. Classification was also confided to such
"associations, it being evident that differences in
"classification were serious obstacles to harmonious
"and satisfactory inter-change of traffic. But what,
"perhaps, more than anything else, influenced the
"formation of such associations, and the conferring
"upon them of large authority, was the liability,
"which was constantly imminent, that destructive
"wars of rates would spring up between competing
"roads, to the serious injury of the parties and the
"general disturbance of business.

"Accordingly one of the chief functions of such
"associations has been the fixing of rates and the
"devising of means whereby their several members
"can be compelled or induced to observe the rates
"when fixed. And in devising these means the chief

" difficulty was encountered. Agreements upon rates " were voluntary arrangements which could be de- " parted from at pleasure, and if they had behind " them no sanction, they were not likely to stand in " the way of a war at rates when the provocation to " one seemed sufficient. Accordingly, the scheme of " pooling freights or the earnings from traffic was de- " vised and put in force through the agency of these " associations, as a means whereby steadiness in rates " might be maintained. The scheme was one which " was made use of in other countries and had been " found of service to the roads.

" The pooling system was looked upon with distrust " by the public, mainly because it seemed to be a " scheme whereby competition between roads could " be obviated, and rates for railroad services put up or " kept up to unreasonable figures. But if railroad " managers supposed that by this scheme they were " to stop competition among themselves, the result " has not answered their expectations. The compe- " tition has still gone on; each road striving to obtain " as large a share of the business as possible, and no " agreement among them could altogether prevent a " yielding to the pressure of shippers for lower rates.

" In 1877 when the pooling system was put in " force by the Trunk Line Association, the rates " charged on the first, second, third and fourth " classes of freights from New York to Chicago " were respectively, 100, 75, 60 and 45 cents " a hundred pounds. They are now 75, 65, 50 " and 35 cents, but the classification as to many " articles has in the meantime been reduced, so " that the actual reduction is greater than these " figures would indicate. Rates from Chicago to " New York, are also proportionately less. A sim- " ilar result has been apparent elsewhere. The " pooling system has done much to maintain " steadiness in rates, but the managers have not " been able by means of it to keep rates up to

" former standards. It has done something, how-
" ever, to check a prevailing tendency to consolida-
" tion. The motives to consolidation are diminished
" by any contrivance which removes obstacles to the
" inter-change of business and increases the facilities
" and conveniences for uninterrupted commercial in-
" tercourse. * * * *

" The pooling of freights and of railroad earnings,
" so far as the Commission has knowledge or informa-
" tion on the subject, came to an end when the act
" took effect. But as pooling was only one of several
" purposes had in view in forming railroad associa-
" tions, the leading associations have not been dis-
" solved, but have been continued in existence for
" other objects. Among these objects are the making
" of regulations for uninterrupted and harmonious
" railroad communication and exchange of traffic
" within the territory embraced by their workings.
" Some regulations in addition to those made by the
" law are almost if not altogether indispensable.
" Thus, while the seventh section of the act forbids
" the carriers preventing shipments from being con-
" tinuous by the device of changing time schedules,
" carriage in different cars, etc., it has not under-
" taken to provide for the making of such time sched-
" ules as would facilitate the continuous shipment, or
" to prescribe rules for the loading and movement of
" cars for that purpose. However desirable this
" might have been if it were practicable to make
" rules which, while general in their nature, should
" be sufficiently definite for enforcement as laws, it
" was doubtless perceived by Congress that these and
" many other matters of detail, though they might
" be of high importance, could not be wisely and
" effectively dealt with by general legislation, but
" that such legislation must chiefly be restricted to
" provisions for regulation and to prevent abuse.

" Moreover, these matters of detail, to a consider-
" able extent, involve the element of contract and

" also of credit when one company becomes the " agent for another in the sale of tickets and the col- " lection of freight moneys; and they then require " the assenting minds of parties, and the number of " parties whose minds are to be brought into accord " being commonly very considerable, an association " of officers or agents is made the means of bringing " about the desired unity of action, and is also made " a common arbiter, to prevent frequent and serious " disturbances.

" Classification also, as has been said, is not by the " Act taken out of the hands of the carriers, though " a certain power of supervision is vested in the " Commission; and classification is not only best " made by joint action, but if it were not so made " and the methods of the roads thereby brought into " harmony, it would probably become indispensable, " however undesirable it might otherwise be, for the " Law to undertake to provide for it. Moreover, " when classification is made and put into effect, it " becomes necessary to make provision for inspection " or some sort of supervision of its application, in " order to prevent its being employed as a device " for giving preferences as between shippers. A " fraudulent classification, through connivance of the " agent in making out deceptive shipping bills, has " often been resorted to for this purpose, and as the " fraud affects the competing carriers as well as the " shippers who are discriminated against by means of " the cheat, the carriers and the public are interested " in such a supervision of the work of all the roads " as will be likely to detect the fraud. Self-interest " on the part of the carriers will impel to this " supervision, and it is most generally done " through some common agency. If it shall be fairly " done as between the carriers themselves, it will tend " to the protection of the public, and the benefits will " be on the same line with those the act undertakes

"to establish or provide for" (Vol. 1 Inter-state Commerce Reports, pp. 669–671).

"It is greatly to be regretted that the same class-
"ification is not adopted by the carriers by rail in all
"sections of the country. The desirability of uni-
"formity is so great that the suggestion is frequently
"heard that national legislation should provide for
"and compel it. If such legislation should be adop-
"ted, it would be necessary to empower some tribunal
"to make the classification, and the difficulties which
"would attend the making would be very great. Re-
"lative rates would be involved in it, for classifica-
"tion is the foundation of all rate making. It was,
"very early in the history of railroads, perceived that
"if these agencies of commerce were to accomplish
"the greatest practicable good, the charges for the
"transportation of different articles of freight could
"not be apportioned among such articles by reference
"to the cost of transporting them severally, for this,
"if the apportionment of cost were possible, would
"restrict within very narrow limits the commerce in
"articles whose bulk or weight was large as compared
"with their value.

"On the system of apportioning the charges strictly
"to the cost, some kinds of commerce which have
"been very useful to the country, and have tended
"greatly to bring its different sections into more inti-
"mate business and social relations, could never have
"grown to any considerable magnitude, and in some
"cases could not have existed at all, for the simple
"reason that the value at the place of delivery would
"not equal the purchase price with the transportation
"added. The traffic would thus be precluded, be-
"cause the charge for carriage would be greater than
"it could bear. On the other hand, the rates for
"the carriage of articles which within small bulk or
"weight concentrate great value, would on that
"system of making them be absurdly low; low

" when compared to the value of the articles, an'
" perhaps not less so when the comparison was w
" the value of the service in transporting them.

" It was, therefore, seen not to be unjust to ap-
" portion the whole cost of service among all the
" articles transported, upon a basis that should con-
" sider the relative value of the service more than the
" relative cost of carriage. Such method of appor-
" tionment would be best for the country, because it
" would enlarge commerce and extend communica-
" tion; it would build up a large business, and it
" would not be unjust to property owners, who would
" thus be made to pay in some proportion to benefit
" received. Such a system of rate making would in
" principle approximate taxation; the value of the
" article carried being the most important element in
" determining what shall be paid upon it.

" Accordingly, and for convenience and certainty
' in imposing charges, freight is classified; that
" which comes in one class being charged a higher
" proportional rate than that which is placed in an-
" other. But other considerations besides value
" must also come in when classification is to be made.
" Some articles are perishable, some are easily
' broken, some involve other special risks in carriage,
' some are bulky, some specially difficult to handle,
" and so on. All these are considerations which may
" justly affect rates, and therefore may be taken into
" account in classification. But still others have been
" found potent. Every section of the country has
" its peculiar products which it desires to market as
" widely as possible, and it is not unwilling that
" classification should be made use of by the rail-
" roads which serve it as a means of favoring and thus
" extending the trade in local productions; favoring
' them by giving them low classification and thus
low rates, and discriminating against those of
other sections through a classification which rated
them more highly.

"It has been in the power of every railroad to "have a classification of its own; but the necessities "of an inter-change of business have brought about "agreements, *and the railroad associations have been "given the authority to make classifications for all their "members. Their labors in this direction have been "extremely important and useful;* they have been "steadily reducing the number of different classifica- "tions in the country, and steadily approaching a "condition of things in which there will be one only. "But in these associations, when in session for the "making of rates, each railroad has, to some extent, "had the district which was served by his road behind "him; he has felt the pressure of the interests there, "and contended for them as against the interests in "classification represented by others, not only be- "cause it was desirable that the road should favor "the policy its patrons favored, but also because the "same policy was likely to be beneficial to both" (Vol. 1, Inter-state Commerce Reports, pp. 667–668).

"The existing rates from Chicago and other west- "ern points to the seaboard cities have not been es- "tablished capriciously, nor reached by gentle and "harmonious methods. They are the result of many "years' contention and struggling, involving ruinous "rate wars between the different lines and repeated "and protracted negotiations, in which concessions "were necessary to arrive at an adjustment, finally "culminating in the creation of a board or tribunal in "which all the lines were represented for the settle- "ment of disputes and the maintenance of peace and "stability. The history of these contentions and "their effect upon the roads and upon business is one "of the most interesting chapters in the record of "railroad development in this country. Beginning "with eager rivalry and each line making rates inde- "pendently, and always with a view of securing the

" largest possible amount of business for itself, the " differences to Baltimore and Philadelphia against " New York were so great that wars were inevitable; " and after most serious losses had been sustained and " transportation demoralized, self-preservation, as " well as the general public interests, required that " destructive hostilities should cease and agreements " be brought about on some basis of common justice " and comparative equity. After several unsuccess- " ful experiments the present basis of rates to the " seaboard cities was established." (Boston Chamber of Commerce *vs.* Lake Shore & M. S. R. Co. Vol. 1, Inter-state Commerce Reports, p. 763.)

" The importance of steady rates may be shown by " placing in juxtaposition expressions of views on the " subject made by persons speaking from altogether " different standpoints. The president of a leading " railroad line, in a recent public utterance, speaks of " ' the enormous importance of reasonable, public, " ' and stable rates to the whole business of the coun- " ' try. Credit and prosperity in every business are " ' dependent upon the credit of railroad securities, " ' and these securities have now reached such an " ' enormous volume that they furnish the real basis " ' of our whole financial structure.' A business man " ' of Kansas City, not connected with railroads and " ' desirous of bringing them under further control, " ' writes to the Commission:

" ' The frequent and violent changes in railway " ' rates which have taken place during the past few " ' years, and which seem likely to be unabated, seem " ' to me to call for new legislation in the way of " ' amendment of the Inter-state Commerce Bill. " ' These changes are ruinous to all business men, as " ' well as the railways, and are the cause of great " ' discontent among shippers everywhere and espe- " ' cially to the farmers. What is needed is a fixed " ' permanent rate, which shall be reasonable, and " ' which can be counted upon by any one engaging " ' in business.' "

"Such views are being continually expressed, "and they well illustrate the opinions which prevail "generally in business circles."

"Steadiness of rates, then, is an object to be kept "in view in the public interest. In a recent passen- "ger rate war between roads extending east from St. "Louis, joint rates were in some instances reduced "several times in the course of a single day, until "they were made absurdly low—the reduction being "sometimes made without even waiting for the con- "sent of connecting roads, so that parties who had "purchased tickets would have found them not hon- "ored before they reached their destination, and been "subjected to great annoyance before redress could "be obtained had the connecting roads declined, as "they might have done, to accept the tickets and "share the losses. When the general passenger "agents had sufficiently subdued their belligerent "mood, the rates were suddenly advanced, with the "inevitable result that parties who had calculated on "the low rates and been enticed from their homes or "seduced into making an action in reliance upon them "found themselves to pay more than they had reason "to expect; they doubtless felt something the same "sense of being wronged that the people of a neu- "tral territory may be expected to feel when it is "overrun by the armies of belligerents."

"Permanence of rates was also seen to be of very "high importance to every man engaging in business "enterprise, since without it business contracts were "lottery ventures. It was also perceived that the "absolute sum of the money charges exacted for "transportation, if not clearly beyond the bounds of "reason, was of inferior importance in comparison "with the obtaining of rates that should be open, "equal, relatively just as between places, and as "steady as in the nature of things was practicable." 1st Report Inter-state Commerce Commission (1887), Vol. 1, Inter-state Commerce Reports, p. 653.)

"The tariffs now in effect have been examined "by the Commission with much care. It is found "that on many articles the rates from the Pacific "Coast to Denver are no greater than to points "further east. The differences which remain are "principally the result of different classifications. "In fact, the subject of classification lies at "the foundation of any attempt to place the "through and local business of the trans-continental "lines upon a relatively just and intelligible basis. "Nothing in the nature of a stated proportion can at "present be discovered. The matter is now in a "state of crystallization among the carriers them-"selves. The changes that have been made within "the past three months in the way of equalization of "tariffs and doing away with differences that have "long been maintained against interior points are "very noteworthy. So long as the carriers are "actively engaged in the rearrangement of the tariffs "and classifications, and while the changes made are "in the direction of conformity to the law, it is better "that the details of the matter be not interfered with "by the Commission. There are many factors in the "situation which are obviously uncertain. The sub-"ject must be dealt with as somewhat experimental. "It is not yet known that the present through rates "can be maintained with a reasonable certainty of "permanence, although the situation supports the "belief that they may be. The effect of the changes "that are being made upon the revenues of the "carriers has not yet been ascertained. Radical "measures taken suddenly might produce unforeseen "disasters." (Martin *vs.* Southern Pacific Co., 2 Interstate Com. Report, pp. 8–9.)

"Among the reasons most frequently operating to "cause complaints of rates may be mentioned:

"The want of steadiness in rates;

" The disproportion between the charges for long " and those for short distances;

" The great disparity between the charges made " for transportation by roads differently circumstanced " as to advantages;

" The extremely low rates which are compelled by " competition in some cases, and which may make " rates which are not unreasonable seem, on compar- " ison, extremely high.

" Some others will be mentioned further on.

" The want of steadiness in rates is commonly the " fault of railroad managers, and may come from " want of care in arranging their schedules, or from " want of business foresight. But more often, per- " haps, it grows out of disagreements between com- " peting companies which, when they become serious, " may result in wars of rates between them. Wars of " rates, when mutual injury is the chief purpose in " view, as is sometimes the case, are not only mischiev- " ous in their immediate effects upon the parties to " them, and upon the business community whose " calculations and plans must for a time be disturbed, " but they have a permanently injurious influence " upon the railroad service because of their effect upon " the public mind. When railroad companies de- " termine for themselves what their rates shall be, it " is not unnatural for the public to infer that the " lowest rates charged at any time are not below " what can be offered at all times, and that when " these are advanced, the company is reaching out for " extortionate profits.

" Now, there are few important lines in the country " that have not at some time in their history been " carrying freight at prices that if long continued " would cause bankruptcy. But to a large proportion of " the public the fact that the rates were accepted was " proof that they were reasonable; and when advanced " rates were complained of, the complainants, to " demonstrate their unreasonableness, go back to the

" war prices, and cite them as conclusive proof of what
" the companies then charging them can afford to
" accept. Many popular complaints have their origin
" in the ideas regarding rates which these wars have
" engendered or fed, and the evils of the controversies
" do not end when the contraversies are over, but may
" continue to disturb the relations of relations of rail-
" road companies with their patrons for many years
" afterwards." (Inter-state Commerce Reports, Vol.
" 1, p. 671.)

As we have before observed, railroad competition is not only pitiless and destructive in its nature, but also necessarily involves a resort to *unfair*, *dishonest* and *unlawful* means. It is needless to say that in the defence of life, if all means are not justifiable, they will, at least, be employed. This rule has no exceptions worth speaking of. In other employments there is less opportunity for unfair competition, because there are few, if any, legal requirements which operate as a restraint upon it. But railroad owners are obliged by law to *publish* their rates; and how can deadly competition be lawfully carried on in *prices*, when the competitors are bound to inform their adversaries what prices they propose to charge? As well might the general of an army be required to inform his adversary at what points and with what force he proposed to make his next attack. The consequence is that deadly competition between railroads always begins by a real, or suspected, *secret* cutting of rates, and is instantly followed by a corresponding secret cutting by all other rivals. *Laws* are wholly ineffectual to prevent this. They simply involve the addition of a host of evils and crimes, such as falsehood, misrepresentation and perjury, with their consequent public and private demoralization. The moment a law imposes a legal requirement of which

the necessities of a life and death struggle tempt a violation, any agreement arresting that struggle must *become* beneficent, if it were not so before.

Upon no subject have the opinions of the Interstate Commerce Commission been more emphatically or more frequently expressed than upon the evils of ruinous competition between railroads and the necessity of preventing it by *some form of agreement*. Many citations to this effect have already been made, and, from a possible multitude, a few only will be added.

The account of the rate war of 1888 (2 Inter-st. Com. Rep., 341), is quite instructive. In the course of it it is said: "We may go further and say that, "in all cases where arrangements have been broken "up under which parties have been competing for "business with maintenance of reasonable and steady "rates, and when obviously only mutual assent can "restore former relations, ordinary business prudence "will dictate that the first step taken should be in the "the line of an attempt to bring about a better under-"standing. Unfortunately in these cases, instead of "being the first step, it is very apt to be the last step "thought of; the first energies are devoted to the "infliction of mutual injuries.

"Sometimes these are continued until the parties "reach the point of exhaustion; sometimes their folly "is made apparent sooner; but in cases like the "present, where agreement, express or implied, at "length restores precisely the state of things existing "before the hostilities began, the intermediate "injuries are by the very restoration shown to have "been needless, if not positively wanton" (p. 344).

"But we desire to apply generally to every kind "of competition herein discussed the observation "above made, *that when competition leads to the "transportation of property below actual cost, fairly "computed, it ceases to be legitimate. Fair and reason-"able competition is a public benefit; excessive and*

"*unreasonable competition is a public injury. Competi-*
"*tion is to be regulated, not abolished.*" (1st Report Inter-state Commerce Commission (1887), Vol. I., Inter-state Commerce Reports, page 288).

"It may be truly said, also, that while railroad "competition is to be protected, wars in railroad "rates unrestrained by competitive principles are "disturbers in every direction; if the community "reaps a temporary advantage, it is one whose bene-"fits are unequally distributed, and these are likely "to be more than counter balanced by the incidental "unsettling of prices and interference with safe busi-"ness calculations. The public authorities at the "same time find that the task of regulation has been "made more troublesome and difficult through the "effect of war rates upon the public mind. These "are consequences which result so inevitably from "this species of warfare that it would naturally be "expected they would be kept constantly in mind "by railroad managers. It is inevitable that the "probability that any prescribed rates will be accepted "by the public as just shall to some extent be affected "by the fact that at some previous time they have "been lower perhaps considerably lower." (Vol. 1, "Inter-state Commerce Reports, 99, 671–672.)

"It is unfortunately true that *the reckless or unfair* "*competition* of one carrier may sometimes compel "another, whose management would willingly do its "business fairly and at remunerative rates, to retire "from some lines of business at competitive points; "but the course of conduct which compels this is "likely to be temporary and to be persisted in only "until the parties guilty of it are brought to more "reasonable action by their losses, or by the inter-"ference of stockholders, who are not likely to sub-"mit quietly to a permanent drain upon their re-"sources from such a cause.

"In all that is now said upon this subject, we have "in mind only carriers operating in a field of legiti- "mate competition whose business they mutually "contend for. A case may be supposed of long cir- "cuitous lines formed by a combination of carriers "for the purposes of a competition not justifiable on "any business or prudential reasons, but wholly ille- "gitimate. But as no such case is presented by the "facts before us, we abstain from any discussion of "questions it might present." (*Re* Chicago St. Paul & Kansas City R. Co.," 2 Inter-state Commerce Reports, page 148.)

"The proceedings on the hearing of this case "showed a want of harmony among railroad man- "agers that is lamentable, because it is every way "harmful. It is harmful most particularly to rail- "road property, but it is harmful to the general pub- "lic also, because it produces a general unsettling of "rates. *Every change in rates affects values; it dis- "turbs trade and alters to some extent the value of con- "tracts.*" (*Re* Chicago, St. Paul & Kansas City R. Co., 2 Inter-state Commerce Reports, p. 149.)

"But it can hardly be for the public good that "carriers by water should be subjected *to unreason- "able and excessive competition;* they ought, as much "as the carriers by rail, to be allowed to charge re- "munerative rates; and the carrier by rail does not "therefore make out a complete case, when called on "to justify extraordinary differences between his "rates at a point of water competition and at other "points, when he shows that at the former he made "the very low rates because otherwise he would not "have obtained the business. It may be that when "the case is examined in the light of the public in- "terest it will be manifest that he ought not to have "had it; that in taking it he had pressed the com- "petition to an extreme which, while it harmed the

" carrier by boat, was harmful also to points on the " railroad by reason of the great disparity in rates " which it created, and also because of its pro- " ducing so little revenue that the burden upon other " traffic was increased in consequence.

" *Undoubtedly the public good is best subserved when* " *all the carriers which the needs of the country re-* " *quire are suffered to do business at reasonable com-* " *pensation*, and when their rates as between all their " patrons are relatively as nearly equal and just as un- " der the circumstances they can be made. These " are facts which are sometimes overlooked in the " making up of railroad rate sheets when water com- " petition is to be taken into account and its legiti- " mate influence allowed for." (2 Inter-state Commerce Reports, page 256.)

" If it is important to the public that a railroad " once constructed should be maintained, the ability " to make charges that will render its maintenance " possible is also of public importance. When, there- " fore, the rate sheets are such that reasonable returns " are not probable, a public injury is threatened, and " the injury is accomplished when the natural result " of bankruptcy is realized. It is of little moment " that in the meantime the public reap an apparent " benefit from the low rates; the apparent benefit is " almost always illusory, for the unremunerative " rate sheets are seldom evenly balanced; they favor " particular towns or particular interests, or they go " spasmodically up and down and thus unsettle prices; " they are commonly made quite as much to injure " competitors as to benefit the party making them, " and it will generally be found that reasonable rates " adjusted equitably over the whole field of service " would have been as much better to the community " as to the carrier itself. This, however, may not at " the time be apparent; the public perceives what

" seems to be a benefit from low rates and the attend-
" ant evils which are not so obvious, may possibly not
" be, perceived at all." (2 Inter-state Commerce Reports, p. 258.)

" In considering whether there is any reasonable or
" even plausible excuse for them, we may freely con-
" cede all that is said by railroad managers regarding
" the difficulty of supporting their mutual agree-
" ments in the absence of any power to prescribe an
" effective sanction for their enforcement. Neverthe-
" less, an impartial observer is compelled to say that
" the methods now so frequently resorted to for the
" remedy of supposed grievances or for the punish-
" ment of supposed wrongs are methods which do not
" belong to the present age. They correspond to the
" methods whereby in a barbarous age a rude redress
" by force is sought for individual injuries. To make
" the adversary feel and fear the power to inflict in-
" jury is often the first and principal thought, and a
" rate is cut when in a ruder age it would have been a
" throat. The motive in each case is the same; to
" obtain a right, or extort a privilege, or punish a
" wrong; and the hostile act may be resorted to irre-
" spective of any question whether there are not legal
" remedies which are adequate for all purposes of sub-
" stantial justice.

" It is a pertinent question in this connection, who
" is hurt by this species of private warfare? The
" carrier aimed at primarily, perhaps, but the injury
" never stops there. The attacking party is almost
" inevitably injured, and the injury may even go to
" the extent of the destruction of the interests of
" holders of its stocks and securities. If it stops short
" of destruction, it may nevertheless impair the capa-
" city of the road for usefulness, and in either event
" what is done is matter of serious public moment.
" But the injury goes beyond the belligerents; it is

"likely to affect in a direct way many others, while "indirectly injuring the whole class.

"The public has an interest in being protected "against the probable exercise of any such power. "But its interest goes further than this; it goes "to the establishment of such relations among the "managers of roads as will lead to the extension "of their traffic arrangements with mutual respon- "sibility just as far as may be possible, so that the "public may have in the service performed all the "benefits and conveniences that might be expected "to follow from general federation. There is "nothing in the existence of such arrangements "which is at all inconsistent with earnest competi- "tion. They are of general convenience to the "carriers, as well as to the public, and their volun- "tary extension may be looked for until in the strife "between the roads the limits of competition are "passed and warfare is entered upon. But in order "to form them great mutual concessions are often "indispensable, and such concessions are likely to be "made when relations are friendly, but are not to be "looked for when hostile relations have been inaugu- "rated." (Vol. 2, Inter-state Commerce Reports, pp. 263–264.)

We have referred to the practice of employing soliciting agents, and the somewhat kindred one of establishing transportation *lines*, Red, White, Blue, &c., as, in large degree, fruitful in violations of law, dishonest artifices and wasteful expenditure. It has been the subject of unsparing condemnation, repeated over and over again by the Inter-state Commerce Commission. Let the following extract suffice:

"Another cause of underbilling is found in the "active competition for traffic, under the stress of "which a vast number of soliciting agents are em- "ployed, whose offices are found not only on the "corners of the most expensive streets of every city,

" but in the rural communities as well; and who rep-
" resent both in their fixed establishments and in
" their movement up and down the land not only the
" carriers directly, but also various so-called 'lines'—
" red, white or blue, as the case may be—whose only
" interest is to obtain traffic; who have little respon-
" sibility of their own or to their ultimate employers;
" and whose object in life is necessarily to make a
" record of success in securing business which shall
" warrant the continuance of their employment and
" of their pay. All this gilded advertisement and
" persistent solicitation in the end is paid for by the
" public. The business exists and the public service
" of transportation must be done, whether or not
" any agent intervenes to help along the contract.
" Whatever arrangements and considerations are de-
" vised for the purpose of securing a shipment to a
" given line are necessarily at the expense and to the
" prejudice of some other shipper. In maintaining
" these methods of operation the carriers afford
" opportunity for the creation of favored individuals,
" localities and description of traffic in contravention
" of the letter and the spirit of the law. Without
" the most rigid supervision the system cannot fail to
" be dangerous.

" Moreover, when soliciting agents are compensated
" by the payment of commissions, the danger is
" largely increased. The division of a commission
" between the soliciting agent of a railroad or of a
" line and his customer obviously operates to give the
" shipper a lower rate of freight than the published
" schedule, and as the matter is within the control of
" the agent's employer, the carrier which permits it is
" responsible for the violation of law involved.

" And on the other hand, the local agents employed
" by the carriers to receive and forward merchandise
" from stations are naturally, in many cases, men who
" are not upon the highest plane of honorable con-
" duct. It appears that temptations of such agents

" by shippers are not unknown nor always unsuccess-
" ful. A trifling gratuity to a station agent may
" easily be so expended as to save many times the
" amount to his customer. The possibilities for
" fraud which may be contrived between unscrupulous
" shippers and weak or unreliable employees are
" enormous." (Inter-state Commerce Reports, Vol. 1, p. 817.)

We content ourselves with offering one more extract which clearly shows the difficulty of preventing the evasion of the prohibitions of the Inter-state Commerce Law by secret, and, therefore, illegal underbidding. The difficulty of enforcing that law is two-fold. (1) The temptations to violation are prodigious. (2) No one having any knowledge of a violation will disclose his knowledge, because all are either deeply interested to conceal it, or afraid to disclose it.

The agreement is likely to be very efficient in its operation; for (1), It takes away the temptation to violate the law; (2) it binds the parties not to violate it, and mulcts them in a severe penalty if they do violate it, and (3) it makes it the interest of all, except the guilty parties, to detect and expose any violation, and thus bring it to punishment.

In its first Annual Report the Commission thus speaks:

" The Act to Regulate Commerce is perhaps most
" often disregarded in the giving of rebates or the
" granting of special rates for the transportation of
" property of large shippers. The rivals of a car-
" rier who does this are likely to have at least such
" proof as convinces them of the fact, even when they
" do not possess positive legal evidence, and very
" often they have such proof as would be convincing

" if presented in Court. Low rates affect market " values, and if one dealer is found regularly dispos- " ing of market products below what others can " afford, the presumption that he is enabled to do " this through being given special favors in trans- " portation may lead to an investigation by the par- " ties concerned, which puts the fact beyond ques- " tion. It might be inferred that in such a case the " carrier whose business was injuriously affected " by the cut in rates, or by some rebate equivalent " thereto allowed by its rival would be ready and " anxious to place the facts immediately before the " public authorities with a view to prosecution, " and would do all in its power to bring the offender " to justice. Its interest, it might be thought, " would be sufficient to impel it to this course of " action. Such, however, is found not to be the " case. A carrier injured is much more likely to " resort to retaliation in kind than to assist in " prosecution; and the Commission has found it " practically impossible to obtain the assistance " of one carrier in bringing another to justice for " such misconduct. The reasons for the unwill- " ingness to give aid in such cases are not com- " monly avowed, but some of them may, without " much likelihood of error, be conjectured. It is " probable that very few carriers feel themselves " entirely secure in the matter of the observance of " the law, and for that reason, if for no other, they " may not be disposed to challenge their rivals " to a contest in the courts with the penal provisions " in view. But if this were otherwise the appear- " ance of a carrier as prosecutor of another, or as " standing behind the prosecution to furnish the " means of conviction, is well understood to be " likely to incite against it the ill-will of some por- " tion, at least, of the business community, and " thereby affect unfavorably their disposition to " patronize it. This is especially the case when

" the prosecution is instituted for the giving of low " rates, for, even when this is done unjustly and " illegally, it, nevertheless, will have, or seem to " have, the effect of favoring localities or impor- " tant interests, and thereby it secures their ap- " proval and invites their support. A carrier who, " under such circumstances, prosecutes, or who " aids a prosecution, does so at the risk, not merely " of submitting itself to such annoyances and ex- " pense as commonly attend a criminal proceeding, " but also of appearing in the eyes of an influen- " tial portion of those for whose favor all are com- " peting, as the prosecutors of a rival whose real " offense, whatever it may be nominally, consists " in the fact that in the struggle for business it has " been the more successful of the two, and for the " commendable reason, if lawfully done, that it has " conceded more to the demands of competition and " been less severe in its exactions. The risk of arous- " ing against themselves a prejudice of this nature is " one which the experience of the Commission shows " the carriers are very slow to encounter. It might, " and probably would be otherwise, if they had reason " to believe that the prosecution of delinquents could " be carried on with the hearty and undivided support " of the business community which ought to be given " it.

" The feeling among the managers of roads on this " subject is very well shown by an extract from a " letter of a general manager of one of the roads ter- " minating in Chicago, who, in response to a letter " from the Commission upon this subject, writes as " follows:

" ' Referring to your complaint against railroad " ' officials that they admit, state and charge that the " ' published rates are cut in violation of law, while " ' at the same time they fail and refuse to give any " ' evidence to the Commission, I beg to say it is true " ' that we do make such charges and have informa-

" 'tion about such cut rates that warrants us in mak-
" 'ing them, still we dare not use it with the Com-
" 'mission or in Court. The transportation of this
" 'country is handled by a comparatively small num-
" 'ber of persons who are all interested in getting
" 'the lowest rates possible and the greatest advan-
" 'tage over their competitors. These shippers we
" 'must depend upon for business, and if any railroad
" 'company or any railroad officials should go into
" 'Court or before the Commission with charges that
" 'such shippers are receiving favors from other rail-
" 'road companies, it would result in that railroad
" 'company or the company represented by such
" 'officials, being boycotted by the majority of the
" 'shippers. In other words, they do not want the
" 'law enforced so long as they get an advantage in
" 'its violation. The . . . . . Railroad
" 'Company and its officers desire that the Inter-state
" 'Commerce Law be enforced, but for reasons above
" 'given we dare not use the information we receive
" 'in various ways as to what is being done by our
" 'competitors and connections. Of course, this in-
" 'formation is not in the nature of absolute proof,
" 'but it is in the nature of prices paid for commodi-
" 'ties and the direction that traffic takes, which is
" 'not its natural channel. In some cases shippers
" 'state frankly that they are getting concessions,
" 'but of course do not divulge just how much, nor
" 'how it is done, and even were we disposed to use
" 'the information we get. I do not know that it
" 'would be competent evidence.'

" If carriers will not assist in prosecuting their rivals,
" still less is it to be expected that they will volun-
" tarily furnish evidence against themselves when the
" acts with which they are accused are criminal in
" their nature. They claim that the law itself excuses
" the citizen from furnishing evidence of criminal
" misconduct against himself, and that as officers, as
" well as the agents, who are actors in illegal trans-
" actions, are generally so circumstanced that if called
" into Court to give evidence they would be excused
" from testifying, they must be expected to decline
" to testify, or even to furnish desired information,

" when asked for the facts out of Court. The proof, " therefore, upon which convictions must be based " must, in most cases, come from parties not engaged " in railroad service, since the persons who have been " favored by discrimination or by illegal conduct are " not likely to give the facts to the public. The " difficulty of obtaining direct evidence from parties " who, by means of participation in the acts, have " such knowledge of the particulars of the illegal " transactions as to be able to testify to them, is " invariably very great, and circumstantial evidence " must, in many cases, constitute the chief reliance. " But circumstantial evidence, though it may be suffi- " cient to show the illegal conduct of the carrier to a " moral certainty, may yet fall short of such legal " proof as will insure conviction of any agent or " officer" (Vol. 3, Inter-state Com. Rep., pp. 339, 340).

These deliberate and solemn declarations of the body constituted by Congress itself to supervise the conditions of interstate commerce and the action of the various railroad systems in respect thereto cannot be too attentively perused and reflected upon by any one who feels it important to gain a knowledge of the *actual effect* of the agreement in question, and whether it is calculated to *restrain*, or to *promote*, the trade and commerce of the country. They prove every material assertion made in this brief of the unmeasured mischiefs of unfair competition in rates and of the inability of repressing them in any other way than by the making and observance of such agreements.

They show in the clearest manner that railroad business, when left, as it is with us, to be carried on by private agencies, and subjected to the stress of free competition, will develop prodigious mischiefs

both to itself and to the public; and that in the natural course of evolution a system of regulation will, step by step, be framed, partly by law and partly by the voluntary action of those engaged in it, calculated to do away with such mischiefs. They show that complete regulation by law is neither possible nor desirable; that the necessary regulation of great industries conducted by private individuals is in most respects better worked out by private agencies, but whether worked out by law, or by private agency, it is the same in effect, and no more a restraint upon trade or commerce in the one case than in the other.

This private regulation is found in every large industry, and is indeed one of the most characteristic of the *phenomena* of modern civilized society. Some instances may be profitably referred to.

a. Trade unions among laborers are of this nature. Laborers form associations for their own good. They adopt rules governing the action of their members, including the rates of wages for which they will work. Such organizations may sometimes be perverted to evil purposes, but there are few who doubt that, on the whole, they are of great benefit to the class of laborers, and have greatly contributed to raise that class to their present more comfortable position. They have the effect of securing to the class a larger share of the fruits of labor then it would otherwise gain. It makes their labor more effective and productive, and increases, rather than diminishes, the productiveness of the whole community.

They go infinitely further in restraint of competition than the agreement under attack; that restrains competition for a few days only, and for the purpose only of compelling competition to be fair, legal and open· but the labor unions embrace provisions absolutely and permanently fixing prices and binding their

members not to work for less prices, and also not to work except upon many other conditions. If a restraint upon *competition* were a restraint upon *trade*, how could any of the labor unions be defended? But would any one say that if there were a State statute condemning contracts and combinations in restraint of trade generally in the same terms as those employed in the Anti-Trust Act in relation to inter-State trade, the labor union agreements would be held illegal under it? And yet the main object of these unions is to do away with competition. The ground upon which they are best defended is that by combination they enable laborers to command higher wages, and thus a larger share of the comforts of life. Formerly this was thought to be against public policy, as being injurious to trade; but more reasonable views have succeeded, and the universal belief at present is that they greatly increase the efficiency of labor, lead to a more just distribution of the products of industry, and the courts of England and America are united upon the doctrine that such unions, when they contemplate alone the benefit of their own members, and are without malice or design to injure others, are not obnoxious to sound public policy, but promotive of it.

b. Associations of employers are rendered necessary as a counter-poise to those of laborers. These also deal directly with prices, and preclude the members from paying more than the rates agreed upon. The combined action of these two private agencies rescues the rates of wages from the dominion of the weakness, or the necessities of individuals, tends to put all upon the same basis, leads to the conference and conciliation, and allows the great law of supply and demand to have more complete play. But what can save such organizations as these from

the charge of illegality if this joint traffic agreement is held illegal?

c. The numerous Commercial, and Stock and Produce Exchanges, and Boards of Trade are illustrations of the same necessity and utility of organizations created by agreement. It is a feature of most of them, probably of all of them, that they fix the charges or commissions which their members may exact for their services to their customers, and thus maintain rates, not temporarily and incidentally, as is the case with the agreement in question, but absolutely; but this is necessary in order to take away the temptation to secret and dishonest practices which would demoralize the business thus regulated and lead men to avoid employing those engaged in it. The courts of New York have more than once expressed their sense of the usefulness of the New York Stock Exchange in promoting order, regularity and integrity in the transaction of an immense body of business. That exchange has existed for a century, and the London Stock Exchange for a still longer period; but who has ever heard it charged that they operated as a restraint on the trade with which they are concerned? Everyone knows that they have prodigiously promoted and increased it; and such has been the effect of the other similar institutions referred to.

A just sense of consistency has compelled an attack by the Department of Justice upon these very organizations as being violations of the Anti-Trust Act, and a case of this description (United States *vs.* Kansas City Live Stock Exchange) is now on the docket of this Court in which a very able brief has been filed, showing the necessary part which such institutions play in the commercial life of the world and how necessary they are to the promotion of trade and commerce.

d. We recur to the illustration suggested at an earlier place in this brief of the condition of an unregulated hack service at the railroad stations in a large city, amounting almost to a public nuisance, and actually deterring passengers from availing themselves of the service, although greatly desiring it. A municipal ordinance, well devised and enforced, would render the service a very acceptable one and prodigiously increase the demand for it. In the absence of such an ordinance a voluntary association of the drivers enforcing upon themselves the same rules would have the same effect and increase the traffic in a like degree. Would an agreement for such an association be properly designated a contract in restraint of trade? And yet it would contain the substance of the very provisions in the Joint Traffic Association agreement to which exception is taken. It would fix the fares, and provide supervising agents who should assign the business fairly among the members.

Trade, or commerce, for the two words are evidently used as synonymous in the act, is the *interchange of commodities*. Transportation is not such interchange, but one of its incidents or instrumentalities; and while the effect of the agreement upon this incident or instrumentality is direct, its effect upon commerce is *indirect*. A regulation of transportation *might*, indeed, be such as to operate as a restraint upon commerce; but it may have, on the contrary, the effect to greatly promote and increase commerce. Whether it have the one, or the other, is a question of fact the solution of which is to be found in an inquiry into the nature of its provisions and their probable effect, as shown by experience.

Agreements in all fundamental respects similar to the one in question have been in force during the whole history of railroad competition, and in some instances going much further in doing away with competition by actually pooling traffic, or its receipts, but will any one say that *commerce*, the interchange of

commodities, has been thereby *restrained*, that there has been *less of buying and selling* by reason of them? Every one must admit that trade and commerce have been prodigiously facilitated by them, and consequently, increased.

Nor has this regulation by agreement in any instance operated to increase rates. During the whole period there has been a constant decrease in charges, almost without interruption, the decline being from about three cents per ton per mile to one-half of one per cent.; and the decline continued during the period of pooling agreements, and also since the present agreement has been in force.

What then is the ground which makes courts hesitate (for they do hesitate) in coming to a conclusion upon the point whether the statute is applicable to such agreements? What are the possible apprehensions that such agreements may have the effect of restraints upon commerce? They are all embraced in one; the apprehension of *monopoly*. It *seems* to some that if the competing railroad systems were actually able to enter into agreements upon rates, they would have the *power* to fix them at any point which they might think fit, and that the temptation to put them at a high figure would be irresistible. This fear is wholly groundless, finding no support either in reason or experience.

We have not heretofore asserted, and shall not now assert, that there is any error in imputing to owners of railroads an obedience to the universal motive of self-interest; and we fully admit that if they had the power, they would put rates at a high figure, if thereby they could make a larger aggregate profit, so as to be able to make larger dividends on the capital invested; but the question is—What action does self-interest counsel? Those who think it advises high prices are under several capital errors. They think that both the demand and supply of transportation are fixed amounts, or approximately so, and consequently that the profits

must increase with the prices. This is the result where the supposed conditions exist. The man who happens to own a single case of boots in a distant settlement can, and will, exact a price ten fold greater than their value at the place of manufacture; but even his price will be regulated by the demand. He may charge fifty, but will not a hundred, dollars. If there were a patent on bicycles the makers would not charge a thousand dollars for one, but would measure the exaction according to the demand, so as to secure, in the aggregate, the largest profit, and to this end they would consider the pecuniary ability of purchasers. Wherever larger sales, made possible by a diminished price, will bring a larger aggregate profit, the price will be diminished. In relation to things which are dealt in on a small scale the most profitable course often is to impose larger prices, for the increase of the demand, consequent upon the diminishing of the price, does not compensate for the diminution of the profit on particular sales. A lessening of the price of medicines may not largely increase the demand; but the result would be quite different in the case of beef, or sugar. The enormous export of a certain inferior quality of refined petroleum oil from this country to ports east of the Cape of Good Hope is made possible only by an extremely small profit on each gallon; but the aggregate return is very large. The raising of prices, when operating on a large scale, is so much more potent to reduce profits by reducing the demand, that self-interest will seldom counsel it.

Another source of error with those who feel apprehensions of monopoly in transportation is the failure to notice the circumstance, already adverted to, that transportation is a *mere service incidental to other business*, and depends for its amount upon the amount of other business. The railroads are, therefore, absolutely united in interest with the business of the regions which they serve, and are affected by all the competitions of such business. The manufacturers

of cotton goods in the North are in competition with those in the South: and this competition forces low rates. Moreover, nations themselves are in intense competition with each other, and all the railroad systems participate in it. A slight increase even in the rates upon wheat from the West to the seaboard would immediately prevent the export of a bushel, and the whole traffic be lost to the railroads.

The business of a great organization like the Joint Traffic Association in respect to rates is not confined, therefore, to conferences and arrangements between the railroads themselves, but includes the great manufacturing and producing interests. It is the representations concerning the necessities to which these interests are subjected, sometimes made to particular railroads and thence transmitted to the Board of Managers of the Association, and sometimes made directly to the latter, which constitute the main study of that Board. It is the great central agency, open alike to the railroads and the rest of the business community, for the adjustment and settlement of problems upon which the successful conduct of all branches of business in large measure depends.

It is impossible to assign too much importance to the considerations last above suggested. How can the multiplied and complicated competitions of a nation like ours be left to stand or fall upon their own merits, if involved in other competitions with which they have no proper concern? A manufacture may be started in one district based upon sound calculations as to ability to compete with others in other districts. Such calculations necessarily assume rates of transportation as they exist in the several districts. A fierce competition between railroads in one district may so lower the rates there as to make it impossible for a rival in another to continue in business, and the latter is consequently made the victim of a competition to which he is not a party and concerning which he could make no calculation. If there were an organization be-

tween all the railroads to which proposed changes in rates were to be submitted for approval, the manufacturers in each, either in person or through the roads doing their business, would be heard, and the destruction would be prevented. If the ownership and operation of railroads were in the hands of the state, no changes destructive of business establishments built up upon the faith of existing rates would be allowed. Is it possible that a regulative power so necessary should be denied when the control of transportation is lodged with private owners?

Nor should the necessary tendency of large railroad organizations to govern their action by the great principles of justice and general convenience be overlooked. This tendency does not proceed from disposition, but from necessity. It is simply impossible for the governing and administrative bodies in control of the great mass of the railroad transportation of a vast region to regulate their action upon any other principles. They must necessarily regard the welfare of *all* their members. They would fall to pieces at once if any partiality were practiced; and the interests of the whole are so inseparably connected with the convenience and prosperity of the public which is served, and from which all the profit must be derived, that justice and fairness to all interests must necessarily become the rule of action.

What has been said is sufficient to show that the apprehensions of monopoly and oppression with which we are dealing have no foundation in *reason*. They have as little in experience. Complaints there doubtless have been in unprosperous times that railroad charges absorb the margin of profit made by those who think that railroads ought to carry, under all cir-

cumstances, at rates which will permit a profit to the producer or manufacturer; but it is believed that no instance can be found of the imposition of plainly exorbitant charges by any railroad, or combination of railroads. This is not for the reason that they are not governed by selfish motives, but because selfishness does not countenance such a policy. And yet it is true that the rates of competing railroads have in general been practically fixed by agreement for most of the time since competition began. The intervening periods when this was not true have been intervals of deadly and ruinous competition — rate wars — speedily terminated by peace, as such wars always must terminate, unless there is some law compelling a continuance of strife to the bitter end. Secret departures from the agreements have, to a greater or less degree, prevailed under the pressure of temptation, and have continually threatened the peace; but the dread of deadly hostilities has, in general, served to induce some, although very insufficient, measure of fidelity.

Were the apprehensions of monopoly and oppression in any degree well founded, it is impossible that there should not have been a general keeping up of rates and occasional periods of excessive charges; but the history of rates in this country during the last twenty-five years shows a uniform and steady decline from about three cents per ton per mile to about one half a cent, and the rate is at the present moment lower than at any former period and very much lower than in any other country.

It may be suggested that, although the foregoing argument and observations concerning the beneficial operation of agreements as to rates may be well founded, yet that the business in hand is the interpretation of an Act of Congress, and that we cannot be assured that Congress was persuaded of the wisdom of these views; that, on the other hand, the erroneous prejudices entertained by large numbers of the people

may have prompted the legislation; that courts cannot correct the errors of legislators, and that the only relief may be in an appeal to Congress.

This is the view which underlies the opinion of the Court in the Trans-Missouri case, as already explained, and it was very pertinent there. If the appeal now made to the court were to *read into* the statute words not found in it on the ground that, otherwise, unsound views, in their tendency destructive of a great interest, would be imputed to Congress, it might fairly be answered that, in order to justify such an interpretation, it must be shown, not only that the views were unsound, but that they were not actually held by any considerable number, and that therefore Congress could not be supposed to entertain them. But no appeal is now made to have anything read into the statute. The present argument is based upon the assumption that the statute must be taken to mean exactly what its words naturally import. But, taking it in that sense, Congress has prohibited such contracts, and such only, as *do restrain trade or commerce* and the real question is whether the Joint Traffic Association agreement does, *in fact*, restrain trade or commerce. Unless the foregoing argument is utterly erroneous this question must be answered in the negative. To say that the agreement does not, *in fact*, restrain commerce; but yet that Congress when it enacted the statute erroneously believed that such agreements did impose such restraint would be adopting a frightful rule of interpretation. *It would be imputing to Congress an erroneous belief without any support from the language employed; and this for the purpose of enlarging the meaning of a criminal statute and subjecting to punishment conduct which cannot properly be regarded otherwise than as praiseworthy!* The duties of Congress certainly do not belong to this court; and as little can the duties of this court be devolved upon Congress. If, in case of an unfavorable decision by this court, an appeal for relief should

be made to Congress, that body might well ask, "If this contract does not, *in fact*, restrain commerce, how came the court to pronounce it illegal? By what warrant does that body impute to us an erroneous belief when we have employed no language which justifies the interpretation?"

V. Upon the foregoing statement of the growth of our railroad systems and of co-operation and agreement among its different members and of the real nature of the regulative Association organized by the agreement before the court, and its actual and intended effect upon trade and commerce, we repeat, though not in the same words, our main proposition, with the view of summarizing under it the leading inferences which that statement justifies. That proposition is *that the agreement which this action seeks to condemn is not, by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce but is, on the contrary, highly needful to, and promotive of, both.*

1. It is necessary to *stability* in rates. And what can be more important to merchant or manufacturer in making engagements or calculations for the future, than to know what rates of transportation he can rely upon?

2. It is necessary to *uniformity* in rates and to the prevention of *unjust discrimination*. This, more than anything else was the object of the Inter-state Commerce law; but, from the nature of the case, any law must be powerless to prevent, in any considerable degree, the giving of secret and unequal rates by a railroad when under the stress of deadly competition it becomes

necessary to give them in order to secure the traffic necessary to life. The event has fully confirmed this obvious truth. That law has not prevented and cannot prevent, ruinous competition, unless it is supplemented by agreement taking away the motive to engage in ruinous competition, and making it the interest of all, except the violators of the law, to have the violators detected, exposed and punished. The agreement converts the great body of the railroads into detective agencies.

3. It is necessary in order to fully secure the general benefits of harmonious co-operation, in classification, interchange of traffic, and other regulations designed to enable the enormous transportation business of the country to be transacted with order, ease, safety and despatch. No one questions the magnitude of these benefits; but they are all, either wholly or partially, sacrificed whenever a war of rates breaks out. How can arrangements predicated on harmony and co-operation be effectually carried out when war exists? And the sole purpose and effect of the agreement is to prevent war, if possible, and to limit and mitigate its evils where it is not possible to prevent it.

4. It is necessary as a supplement to the Interstate Commerce Act, and in order to make the objects of that act attainable. Uniformity in rates, stability in rates, and fair and just rates were the only objects of that enactment. We have mentioned the necessity of it to the first two of these. It is alike promotive of fair and just rates. Its efficacy in this direction will be further dealt with presently.

5. It is necessary for the *prevention of crime*, for its *punishment* when committed, and for the *prevention of perjury*. Competition between railroads, unless arrested at some point by agreement, must, as we have seen, necessarily become war, and such war can only be waged by the giving of secret and *unequal* rates. Whatever rates are necessary to secure traffic must be yielded, and this means a struggle by rival soliciting agents who can make themselves acceptable to their employers only by "getting there." The best bargain that can be made will be the only rule that will be followed, and inequality is the immediate and inevitable consequence, and to such a degree that there can be no pretence to equality. This means crime on the most gigantic scale, and concealment on the like scale. Every participant is involved in the crime, and concealment, and perjury in order to secure concealment, are the necessary attendants.

It is marvellous that any should imagine that such an enactment as the Inter-state Commerce law could be wise or just unless those called upon to obey it were permitted to adopt the only expedient which would enable them to obey it. To subject railroads to competition, liable at any moment to run into deadly war, from which it is impossible for them to retire, and which it is equally impossible for them to carry on without discrimination in rates, to make such discrimination in rates a crime, and then to declare that the only means by which the war can be avoided, and the consequent criminal discrimination avoided, to be in itself a crime, would be imputing to the legislature an inconsistancy and absurdity which nothing short of the most unequivocal language, plainly requiring it, would warrant.

6. All that Congress has prohibited is, so far as con-

tracts are concerned, "contracts in restraint of trade." What contracts are of this character is left to the Courts to determine. Unless the foregoing argument is wholly mistaken, the final question is: Is a contract between railroad companies, necessary to the uniformity, the stability, the fairness and the justness of rates, necessary to the ease, safety and convenient despatch of the enormous transportation of the country, necessary as a supplementary aid to the Interstate Commerce law, and in order to enable railroads to comply with its provisions, necessary to the prevention of crime, concealment and perjury, otherwise sure to be committed to a prodiguous extent, and necessary to the preservation of great public facilities, a contract, combination, or conspiracy in restraint of trade within the meaning of the Act?

VII. The views heretofore asserted concerning the interpretation and application of this statute in no degree tend to rob it of a legitimate and useful operation in accordance with sound views of public policy. It reaches and represses, within the limited scope of federal jurisdiction, every contract or combination designed to create a monopoly or restrain trade. Further than this no legislation should go.

1. So far as concerns contracts *directly* restraining trade, as where a man covenants not to carry on a trade *without a good consideration*, the statute is clearly effective, although the wisdom of applying the criminal law to such cases might well be doubted; for the instances in which such contracts are likely to be made, to the public injury, are so rare that severe repression is hardly called for.

In the cases where contracts are made upon good consideration, as where a man sells a business or good will, created by his industry, a covenant not to continue it is necessary in order to enable him to sell it. Such contracts are plainly not in *restraint* of trade; they *are trade itself*, and should receive, as they now do, the favor of the law.

2. In the case of unions among laborers embracing rules not to work for less than certain specified wages, although there is really an *appearance* of restraint, there is none in reality, at least where such unions are formed in good faith to promote what is honestly believed to be the good of the whole body. In such cases it soon becomes manifest that the wages cannot be raised above the rates which the general law of supply and demand allows; and to hold them at that point is a public good. It is the only mode open to the class of laborers to prevent advantage being taken of individual weakness.

Trade unions may sometimes be perverted to evil purposes; but, on the whole, their beneficial operation is admitted, and no sound policy would seek to suppress them on account of occasional mischief. These do not, in fact, restrain trade. They promote it by benefitting the laboring classes, making their labor more efficient, and making them *larger consumers*. Large consumption is the indispensable condition to large production.

Similar unions among employers, stand upon the same ground, and are a needed counter-poise to unions among laborers. They lead to conference and a friendly consideration, on a large scale, of what is for the good of both classes, and to a fixing of wages at juster rates than would otherwise be possible.

3. But wherever there is a *perversion* in either of the above cases of the power of union for the purpose of oppression, either of individuals or the public, the agreement or combination is in restraint of trade, and is prohibited by the statute. It may be suggested, indeed, that the discovery of the illegitimate purpose may be difficult; but if this were true, it would not matter. In such cases, at least, the law will not prohibit fair, honest and useful transactions from some apprehension that possible misdoing may escape punishment. But the discovery is not difficult, and juries need rather to be cautioned against finding an intent to repress without sufficient evidence.

4. So far as monopolies are concerned, the statute is equally effective. But it is needful to keep clearly in mind what a monopoly is. A great aggregation of wealth, whether held by one owner, or many together, under a corporate form or otherwise, cannot acquire, or create, a monopoly in anything which is not a natural monopoly, or one created by law. In things capable of being produced to an unlimited amount by the mere application of capital and labor there can be no monopoly, unless it is created by law. The grant of an exclusive right to make and import leather, or other similar commodities would indeed create a monopoly, and perhaps once did in England. The statute against monopolies put an end to such abuses by opening the business to competition, and little has been heard of monopolies in such things since.

An enormous aggregation of capital may indeed control, to a certain extent, and for a limited time, the production of a great staple, such for instance as sugar; but this is not, of necessity, a monopoly: it may be only the fair reward of the superior advantages which belong to a large capital and the

successful practice of economies in production. Small establishments could not compete with it, because they could not furnish the article at so low a rate; but, should the large establishment endeavor to raise the price to any considerable extent, the competition, at first overcome, would speedily show itself and compel a reduction. It may be said that the great sugar monarch is still enabled to make a considerably larger profit than is reaped in other industries, and this may be true; and for the reason that there is not temptation enough to bring together a similar aggregation of capital to make a contest with it. If this be an evil it is one created, not by combination, but by the action of the government in allowing a prohibitive duty; and if the duty were withdrawn, or even considerably diminished, the price would instantly come down. The prohibitive duty is, in itself, a monopoly to a certain extent, because it shuts out the competition of the world.

It is an inevitable consequence of prohibitive duties, by the temptation they afford of a large profit, to attract to the industries thus favored an undue amount of capital, and the result is, inasmuch as the surplus cannot be sold in foreign markets in competition with producers enjoying untaxed material, to produce a glut at home. Under such circumstances the home producers find themselves engaged in a ruinous competition and the natural and proper endeavor is, instead of quitting the business which, perhaps, they cannot do without heavy loss, to save themselves from it by agreement to limit production to a point so proportioned to the demand as to enable them to reap a living profit. Whatever advantages there may be in prohibitive duties, this is, undoubtedly, one of the disadvantages, and, inasmuch as it is one created by law, the law ought not, by prohibiting such agreements for safety, to make those difficulties, which it has itself created, as fatal as possible.

It is quite true that where there happens to be a

small number of producers in such an industry there is, when the profits are large, a temptation to so unite themselves by agreement as to maintain an *undue* price; but there are two causes which render such attempts, for the most part, temporary only and of comparatively little consequence. In the first place, as they are, and always were, illegal and uninforceable, the parties to them have nothing to rely upon except their own words, and, next, the temptation to sell more goods and for less than the agreed price is so great that it will be yielded to by some, and when this is suspected by the others, there is nothing to restrain the latter.

The case is quite different where the motive to the agreement is not to make a large profit, but to prevent the compulsion of selling at a ruinous loss. The case is that of over-production. There is no large profit to be made by a violation of the agreement, and the temptation to break it is much less, and the inducement to keep it much greater, for it is the only escape from ruin.

There is ordinarily no difficulty in distinguishing between the legitimate and the illegitimate agreements. One is entered into when the demand exceeds the supply and the profit is large; the other when the supply exceeds the demand, and the profit small, indeed, usually, none at all. In the latter case the motive is obvious, to save the parties from ruin; in the other equally obvious, to impose an exaction on the public. In the one case the parties are engaged in defence; in the other in attack. There is one simple and easy inquiry the answer to which will at once discriminate the cases. Does the demand exceed the supply so that all the combining parties might be profitably employed in satisfying it? or does the supply exceed the demand, so that if all continued to produce, the product would have to be sold at a loss?

The statute is perfectly adapted to reach the only

one of these two cases which it is sound public policy to disfavor.

5. But there are other monopolies, not created by law, but which are a gift of nature. The things embraced by them are not the product of industry, for, if they were, they could be indefinitely multiplied. They exist in respect to those treasures of the earth, the supply of which is limited, such as the product of most mines, anthracite coal, for instance. Sometimes the supply is so abundant, that the limit is of less consequence. Land itself is limited in supply, but in this country the supply is so large, except in crowded populations, that it has but few of the features of a monopoly.

Wherever a monopoly exists, especially in things of which there is a large demand in proportion to the supply, large profits may be reaped by the proprietors, and the whole may be owned by a single proprietor or company, and in such cases, it may exact such price as the demand permits. No law can control the conduct of owners in these particulars without trenching upon the constitutional rights of property. It is one of the things which make up the conception of property that the owner has absolute control over it, and may dictate the terms on which he will part with it. Possibly, in the case of necessaries of life, such terms might be exacted as would cause public suffering and justify the State in an exercise of the right of eminent domain; but such an instance has not yet occurred.

In these cases of limited supply there is a temptation for all the owners to combine and thus secure to themselves by executory agreement the same advantages which they would enjoy if absolute owners. Contracts and combinations of this character among the owners of a thing the supply of which is limited by

nature are clearly illegitimate. They have uniformly been so declared by the Courts, and this statute is adequate to reach and punish them. By actual sale a single ownership may be created, which the law cannot prevent.

The foregoing concludes our discussion on the principles of reason, of law, and of sound public economy of the question whether this agreement *restrains trade*. Unless the line of argument is very gravely erroneous, its just conclusions reach much beyond the establishment of the negative of that question, and demonstrate that the agreement is in the highest degree *promotive* of trade. But they reach much further still, and show that some agreement with similar aims and provisions is absolutely *indispensable* to trade.

A strong assurance is felt that this last conclusion will be accepted when the deliberate attention of the Court is given to the results which would follow if this agreement should be condemned as in violation of the Anti-Trust Law. Those results are declared in the next proposition, which is believed to be fully established by the considerations already adduced.

SIXTH POINT.

If the Anti-Trust Act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow.

(1.) That all railroad transportation be abandoned; or,

(2.) The consolidation of all competing railroads under a single ownership, either governmental or private; or,

(3.) That all competing railroad business must be carried on in constant and daily violation of criminal law.

1. Of these alternatives neither the first or the second can be contemplated as possible. Railroad transportation cannot be abandoned, and no governmental ownership can, under present, or any probably near future conditions, be brought about. We have no sovereign government possessing the requisite powers.

2. It is the third alternative which must follow; and that it will follow will at once be seen by recurring to some facts and circumstances already set forth.

The Interstate Commerce Law requires every company to fix, file and publish its rates, and to strictly adhere to them by charging no more and no less than the rates published. It will be admitted that, in order to comply with these requirements, each company must have the *information* necessary to

enable it to *determine* what rates it will charge, and the *ability* to adhere to its rates *as determined*.

But what is the *information* which is necessary? A company may indeed form a notion as to what is a *reasonable* compensation for each particular service, but this is not enough, any more than in the case of the sale of goods by a merchant. He can sell no goods at any particular price provided his rivals are selling them at a lower price; nor will a competing railroad obtain any goods to be carried if a rival road carries them for less. What the railroad company needs to know, and about the only thing it needs to know, is what its rivals are going to charge, and the difficulty is at once encountered that there can be no *agreement* without a violation of law.

But it will be suggested that, although agreement is forbidden, the asking and answering of questions by one company of, and to, another is not forbidden; in short that *mutual conference* is not forbidden. True, these things are not forbidden, and, therefore, let us see what progress can be made in this innocent direction. The rate agent of one company will say, "I must learn of my rivals what rates they are going to fix," and he goes to one of them and asks for a conference on the subject saying that the law does not make *mere conference* criminal.

But the answer would be that conference would do no good, for neither could form an estimate even, unless the conference embraced *all* the rivals. A conference of all is, therefore, determined upon and had, and, after much discussion and change of estimate, it is found that the final declaration of each one is that it will file and publish certain specified rates. No agreement is, in form, made, but each party knows that all are impressed with the conviction that harmony of action is absolutely necessary. They act upon that conviction, and rates are filed and published accordingly, and expectations may, or may not, be disappointed. If not, all may be well. But what has

thus been done? *An agreement has been entered into*, whatever the parties might say about it. *Each adopts a line of action upon a well-grounded expectation, induced by the declarations of the others, that they will adopt a certain line of action;* and this is *contract;* and the proof that it is contract is that any failure by any one of the parties to act in the manner declared would be instantly stigmatized by the others as a *breach of faith;* and, if the offending party should say in defence of himself that he had never agreed, the declaration would properly be stigmatized as shameful, and as adding insult to injury.

If, however, the lack of writing or other form should lead a criminal court to say that the proof of contract was not sufficient, there could be no doubt of the complete proof of *combination and conspiracy*, which are punishable under the statute in the same manner and degree as contract.

It is immediately manifest that such conferences would amount to nothing unless there were a *tacit assurance* given by each to the other that all might confidently expect that the rates thus coincided in, and which each expressed an intention to file and publish, would be adhered to. And this, at once, conclusively stamps the conference as *combination and conspiracy*.

3. No intelligent men familiar with railroad business have ever supposed that it was possible for competing railroad transportation to be carried on permanently without a *uniformity in rates*, fixed either by express or tacit agreement. There may be intervals without such agreements, but they are intervals of hostility, which, unless superseded by treaty, will inevitably and speedily degenerate into deadly war. In England tacit agreement, supplemented by some pooling agreements, keeps the peace. The whole of the

continent is regulated by agreements which the nations confirm and supplement by treaties.

In this country the end has been accomplished, less perfectly indeed, by agreements, pooling or other, and the present agreement is one devised to bring about the desired end without a resort to pooling, that form having been prohibited.

4. The multitudinous expressions of the Interstate Commerce Commission, many of which have been hereinbefore cited, to the effect of the necessity of harmony and concert in the fixing of rates, in order to avoid ruinous war, all mean uniformity of rates by *agreement*, either express, or tacit. That competing railroads can transact their business without it has never occurred to this body.

5. This Court in its opinion in the Trans-Missouri case fully expresses, as we understand it, the necessity of an agreement of some sort between competing roads upon rates, it says (p. 338:) "It is only by the "exercise of good sense and the presence of a com- "mon interest that railroads without entering into any "affirmative agreement with regard thereto, will keep "within the limit of exacting a fair and reasonable "return for services rendered." This would seem to mean—must mean—that the competing roads should have conferences with the view of reaching uniformity in rates, but without attempting to make a binding and enforceable agreement. There is no other way that good sense, or the conviction of a common interest could manifest themselves. Neither of these qualities could prevent an immediate and deadly competition if no uniformity in rates existed. But we think it must have escaped the notice of the Court that

such conferences and understandings involve the same criminality as the most formal contract. What the law is aimed at is "restraint of trade," and it is immaterial whether this is effected by contract, combination or conspiracy. The agreement in question is supposed to restrain trade and therefore to violate the law, because it contains a restraint on *competition*. If this be a restraint of trade effected by *contract*, surely a conference, resulting in a tacit understanding by which the same result is reached, is a restraint by combination and conspiracy. To be sure, the *tacit understanding* would not be, in terms, enforceable; indeed it might be perfectly well understood that the parties to it did not *intend* to legally bind themselves, and, therefore, it would not be technically a *contract*. Being void, it would be a nullity. It is for this very reason that Congress made it also criminal to *combine* or *conspire* to do the thing a contract to do which was prohibited. It is the *restraint*, however brought about, which the legislation was aimed at. And we respectfully submit to the Court whether Congress can be taken to have intended to punish as a crime a formal *contract* to do a thing which it would be innocent and even praiseworthy to do by conference and tacit understanding.

There are some observations in the opinion connected with the extract above cited, which seem to us to disclose a misapprehension. It is said that "it is "a matter of common knowledge that agreements "as to rates have been continually made of late "years, and that complaints of each company in re- "gard to the violation of such agreements by its "rivals have been frequent and persistent. Rate "wars go on notwithstanding any agreement to the "contrary and the struggle for business among com- "peting roads keeps on and in the nature of things "will keep on, any alleged agreement to the contrary "notwithstanding." * * * * * * * "These "agreements have never been found really effectual

"for any extended period" (p. 338). If this were true to the extent supposed, of what advantage would "the exercise of good sense" and "the presence of a common interest" be? If men will not keep a formal agreement to do, or not to do certain things, are they likely to keep a tacit, informal, and unbinding understanding to do, or not to do, the same things any better?

But this failure to observe agreements has not been thus general. *In general* the agreements have been kept, or so far kept as to preserve the peace. The general condition has been the observance of uniform rates—peace, and not war. The latter has been the exception. It is the terrible consequences which flow from breaches of agreement and consequent war, which give emphasis to that condition, and not its permanency. These consequences have led to improved forms of agreement supposed to be more likely to be kept, and finally to that of pooling. The prohibition of that form has led to the present one. That this will permanently and faithfully be kept cannot be affirmed with certainty; but if it will not be, certainly no tacit understanding, however reached, will be.

It is the main feature of the present agreement that it gives what is called "good sense" a chance to play and to be effectual. The two reasons which have made it difficult to keep agreements (other than pooling ones) heretofore are, first, that when a weak road has found itself unable to maintain itself under the agreement, it was *compelled* to break it; second, that when even strong roads found, or suspected, that others were not keeping the agreement they would not observe it themselves. The present agreement adopts rates supposed to give all a living chance. It does not *attempt* to bind them to keep such rates. They may depart from them to any extent at pleasure. But the rates established represent the common judgment of what

is fair, and the weak roads know that war and ruin will be the result if they compel a strife by departing from the rates. And they are not *compelled* to depart from them. Another resource is provided. They may ask for concessions, and the reasonableness of the request will be fairly considered; if well founded, it will be granted; if not, it will be refused, and properly refused; for if a road cannot be run on terms which make some return on the capital invested in it possible it ought to be abandoned.

6. We may, therefore, ask with increased emphasis the question whether Congress intended in enacting the Anti-Trust act to condemn and make criminal as *restraints on trade* those regulating contracts and arrangements respecting railroad traffic which, in some form, are everywhere adopted, and without which it is impossible the business of railroads could be carried on in conformity with its own laws?

In the Case of Trinity Church *vs.* The United States (143 U. S., 457), the question was made whether the statute against the importation of alien labor under contract was applicable to a contract with a clergyman abroad to remove to this country and engage in his calling here. It was conceded that the contract was fully embraced by the terms of the act, but the Court declared that it was not within the letter or intent of the act, and not, therefore, affected by it. The ground was that Congress could not be supposed to have intended to repress a transaction so innocent, according to the universal understanding of men, and the decision was supported by an overwhelming array of authorities.

We do not ask the Court to go to such a length. We do not ask it to take *a case out of the terms* of a statute. Our point is whether Congress, by the term "restraint of trade," should be held to include

an agreement which not only promotes trade, but is necessary to it. We invoke the attention of the court to the whole line of argument in the case cited, and to all the authorities referred to in it as decisive of the present question.

SEVENTH POINT.

The positions taken in this brief are fully supported by the weight of authority.

I.—What we have been above discussing is the principles of public policy in respect to alleged restraints upon trade effected by agreements among those engaged in any particular industry. It would be idle to expect an entire concurrence with each other in the multitude of judicial decisions upon these questions. Upon no questions is there such a lack of thorough knowledge and intellectual grasp among lawyers and judges, or more of yielding to popular prejudice than upon questions of public policy.

But, notwithstanding this, the distinctions above taken run through the whole body of judicial decisions and are fully supported by the best authorities.

1. Where the agreement has been one between the owners of a commodity of which the supply was limited by nature, that is, the case of a natural monopoly, the agreement has been condemned.

2. Where it was between a few proprietors of pub-

lic grants in respect to which there was a practical monopoly, such as gas companies, and the attempt was to *limit the supply* by agreement on the part of some *not to do business*, the result has been the same.

3. Where it has been entered into by the proprietors or producers of an article the supply of which is not limited by nature, but with a *purpose* to control, as far as possible, the production in order to exact an *undue* price, the agreements have been generally condemned.

4. But where the element of gaining control for the purpose of exacting an undue price is eliminated, and the agreement appears to be for the purpose of escaping the loss consequent upon ruinous competition, where the supply exceeds the demand, it has been sustained.

5. Nowhere, it is believed, has any decision been pronounced in recent times that a restraint upon *competition* is, *as such*, and without reference to its objects or effects, a restraint upon, or injurious to, trade. On the contrary, those agreements which exercise this restraint upon the largest and most extensive scale, such as trade unions, have been declared, when formed, not for coercion upon others, but to save their members from the burden of excessive supply and consequent low wages, declared innocent, and even praiseworthy.

And agreements between railroad companies, especially, where the object appeared to be, as the pleadings admit in the present case, to save from the de-

struction consequent upon ruinous strife, have been vindicated by the ablest judges as useful and necessary.

In the case of Kellogg *v.* Larkin, 3 Pinney's Wis. Rep., 150, in a learned and elaborate opinion by Howe, Judge, it was said:

"If it be true, also, that competition is the life of trade, it may follow such premises, that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is the least reliable of the host that may be picked up in every market-place. It is, in fact, the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.

Indeed, by reducing prices below, or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable, that in the case of Stanton *v.* Allen, 5 Denio, 434, it should have been urged against the agreement, that its object was to exempt the standard of freights, etc., from the wholesome influence of rivalry and competition. For it is very certain that because of that very purpose, because they did not tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial restraint of trade, ever since the case of Mitchell *v.* Reynolds, *supra*, was decided."

In Perkins *v.* Lyman, 9 Mass., 522, the Court said:

"Instead of an injury to the public the community may receive benefit from such procedure, as it will go to prevent the trades being overdone and so becoming profitable to none."

Also, in the case of Leslie *v.* Lorillard, 110 N.Y., 519, Judge Gray said:

"I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to be an evil."

Again, in People *a.* North River Sugar Refinery Company, 4 Ap. Cases, 674, when tried before Judge Barrett, at the Circuit, he said:

"Excessive competition may sometimes result in actual injury to the public, and competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy."

In the late case of the National Benefit Co. *v.* The Union Hospital Co., 46 Minn., on page 275, Judge Mitchell, speaking for the Supreme Court, says:

"And again, modern investigations have much modified the views of courts, as well as political economists, as to the effect of contracts intending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of the state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions—both English and American."

The Supreme Court of New Hampshire in the case of Manchester, etc., R. R. Co. *v.* Concord R. R. Co., (20 Atl. Rep., 383) already referred to, discusses this doctrine of unregulated competition with so true an appreciation of its meaning, and its consequences, that we quote at some length from the opinion:

"While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefited by unrestricted competition between railroads has been so emphatically disproved by the results which have generally followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of parallel or rival roads may, as a rule, be justly characterized as illusory and fallacious. Upon authority also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy. Hare *v.* Railroad Co., 2 Johns & H., 80, is directly in point. In that case a bill in chancery had been brought by a stockholder in the defendant company to annul an agreement between two railroad companies to divide the profit of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill Vice-Chancellor Wood said (page 103): 'With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. * * * It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard.' So also, in 1 Redf.

R. R., sec. 146, par. 2, it is said: 'There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition.' And Mr. Morawetz says in his admirable treatise on corporations: 'Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among companies are designed to effect this result, their purpose is not injurious to the public, or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is, therefore, impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges, or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts.' Mor. Corp. (2d Ed.) sec. 1,131. In the same section, in speaking of contracts in restraint of trade (to which many of the authorities, and much of the argument for the defendant relate) he says: 'Even if there were such a rule, as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed also that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and

apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and if the operation of the road were stopped the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges. The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiff could not reasonably hope to successfully compete with its more powerful rival. The alternatives presented, it may safely be assumed, were combinations or ruinous competition. It accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiff to an accounting with the defendant. Numerous cases have been cited in behalf of the defendant in support of its proposition that the combination between the parties must be regarded as void at common law because against public policy. For want of time it is quite impossible to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiff; but it is sufficient to say in general terms, as is there said, that they are cases of contract in restraint of mercantile business; or cases of contract which attempt to derogate from the right of eminent domain inherent

in the state; or cases of contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build or cease to operate a road which it was chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were ultra vires; in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea is sustained."

Judge Cooley—at that time Chief Justice of the Supreme Court of Michigan—in an article in the Railway Review, April 26, 1884, on the subject of Traffic Pooling, says:

"It is a familiar principle in the law that contracts in general restraint of trade are void. Therefore if a man contracts with his rival in business that for any agreed consideration he will no longer pursue his customary calling within the state in which he resides, the promise is one he may keep at pleasure or break with impunity. The reasons are that such a contract if enforced would deprive the public of the benefits of competition, and at the same time impose restraints going far beyond what would be needful for protection to the party bargaining for them. But it was always agreed that competition, in so far as it operated injuriously to individuals, might with entire competency be limited by contract; and in a great variety of cases it has been held that a man may lawfully bargain to put an end to an injurious competition in his business in the locality where he carries it on, or that he may bargain to prevent the establishment in that locality of a competing business which he fears may be injurious. It is only when he exacts terms that go beyond giving him protection that the law holds his contract to be unreasonable, injurious to the public, and therefore illegal. The reader unfamiliar with the law reports will find many of the cases referred to in the note; and it will ap-

pear on an examination that in all them *the legality of bargaining to limit competition, when it is kept within the bounds of reasonable protection, is either assumed or expressly affirmed*"[1]

In the same article Judge COOLEY says :

"The principal danger to be guarded against is the cutting of rates. In the unregulated and unreasoning strife between railroad companies this cutting is not only carried on to an extent that is ruinous to the companies themselves, but it becomes a disturbing factor in all commerce, and it is perfectly correct for the railroad companies to say, as they do when defending pooling, that unjust discriminations are a necessary result. The sort of competition which is the 'life of trade' in a war of rates, incites every agent to make secretly and by every form of indirection such terms as will secure the business; it is inevitable that these shall be without uniformity, and that those who push the hardest and bargain most—which will generally be the large shippers—will be most favored. Low rates, when they can be depended upon for any considerable time, increase the prices of grain and other market commodities in the hands of producers; but they affect prices little, if at all, when it is uncertain from day to day and from hour to hour what they are to be, and consequently such benefits as come from the hostile cutting of rates are reaped principally by speculators and other large shippers. It is doubtful if the shipping interest ever receives benefits equivalent to the losses which the railroad interest suffers in a war of rates, and the benefits to the general public will seldom equal the incidental injuries. Nothing, therefore, can be plainer than the desirability that reasonable rates should be maintained with general

[1][Judge Cooley's Note]:

"The following cases are selected from the great number which recognize the principle, because the republication in the volumes here given is accompanied by valuable notes and references: *Mitchell* v. *Reynolds*, Smith's Leading Cases, 508; *Perkins* v. *Lyman*, 6 American Decisions, 158; *Pierce* v. *Fuller*, 5 American Decisions, 102; *Bowser* v. *Bliss*, 43 Am. Dec., 93; *Grundy* v. *Edwards*, 23 Am. Dec., 409; *Morgan* v. *Perhamus*, 38 Am. Reports, 607; *Pike* v. *Thomas*, 7 Am. Dec., 741; *Drill Company* v. *Morse*, 4 American Reports, 513; *Hyt* v. *Holly*, 12 American Reports, 390; *Hubbard* v. *Miller*, 15 American Reports, 158; *Cook* v. *Johnson*, 36 American Reports, 64.

uniformity, so that they may be calculated upon in the making of contracts and purchases, and so that small shippers as well as large, the man who merely sends his household goods as well as the speculator in grain and provisions, may have the benefit of them."

In another part of the article he says:

"Such a state of things can exist in no business from which a transfer of capital is possible; and the competition it creates instead of being 'the life of trade,' is as to this business destructive of the capital invested in it. It becomes a matter of necessity then, that the competition which is so likely to be destructive should be restrained within the limits which will admit of reasonable and reliable prosperity; and some common arrangement between the roads seems to be the only means yet found by which this can be accomplished."

In another portion of the article, Judge COOLEY points out what so many people forget—that there is a wide difference between capital invested in railway enterprises and capital invested in ordinary business pursuits. He says:

"In most kinds of business, competition easily and naturally regulates the extent to which a business shall be carried on; persons engage in it only when they think they see a reasonable opening for profit; they push the business with men and money when the promise of success is such as to warrant it, and when it is not, operations are reduced; some, perhaps, go out of the business, and capital seeks other investments. The merchant, when competition becomes too severe for him, may turn farmer or manufacturer; the manufacturer may change his line of production or temporarily reduce it; and these changes it is generally possible to make without serious loss. Very seldom the whole plant for one business will be useless for any other. The general results of competition will therefore be such that, while the public will have the benefits of low prices, a general equilibrium of demand and supply will be maintained without bringing disaster to individuals.

Much of this is as different as possible in the railway world. The investment for the purposes of a railroad is permanent, and is available to a single purpose. If it cannot be made available for the transportation of persons and property it is a wasted investment, as much so as if it had been cast into the sea. But when the construction of railroads is entirely unrestricted, there is always a tendency to build more than are needed, and more than can be made profitable. The reasons for this are numerous. Railroads are a great local convenience; every village wants one or more; and it is easy for plausible men, who see individual profit in their construction, to convince the local community that a road which will accommodate their local needs must be profitable. * * * Roads have thus in many cases been constructed at general expense in which a capitalist for the purpose of investment would put nothing. But roads are also built under an expectation, on the part of those who originate and push them, that in some way the originators will be enabled to make them available for their individual benefit, regardless of their real value; sometimes through holding the control and managing them; sometimes by forcing the owners of other roads to which they would be rivals to buy them."

6. But nowhere can there be found, it is believed, a decision that an agreement like the one in question, which does not even aim at any permanent restraint upon competition, but a mere temporary adhesion to prices for a period of thirty days, for the purpose of preventing dishonest and illegal competition, is in any sense a restraint upon trade, or injurious to it, or in any way obnoxious to legal condemnation.

A suggested distinction between agreements restraining competition between persons or corporations engaged in business of a public nature and those engaged in private business.

The opinion in the Trans-Missouri case suggests this distinction in the following language :

" It must also be remembered that railways are pub-
" lic corporations organized for public purposes,
" granted valuable franchises and privileges, among
" which the right to take the private property of the
" citizen *in invitum* is not the least (Cherokee Nation
" *vs.* Southern Kansas Railway Company, 135 U. S.
" 641-647) that many of them are the donees of large
" tracts of public lands and of gifts of money by
" municipal corporations, and that they all primarily
" owe duties to the public of a higher nature even
" than that of earning large dividends for their share-
" holders. The business which the railroads do is of
" a public nature, closely affecting almost all classes
" in the community—the farmer, the artisan, the
" manufacturer and the trader. It is of such a pub-
" lic nature that it may well be doubted, to say the
" least, whether any contract which imposes any re-
" straint upon its business would not be prejudicial to
" the public interest."

This suggestion of a distinction in the case of corporations engaged in what is called a public business which would render contracts void, which would be entirely valid, if made between natural persons, is supposed, in the opinion, to have a foundation not only in principle but in authority; and to show this, a passage is quoted from the case of Gibbs *vs.* Baltimore Gas Company, 130 U. S. 396-408. The passage quoted is as follows:

" The supplying of illuminating gas is a business

" of a public nature to meet a public necessity. It is " not a business like that of an ordinary corporation " engaged in the manufacture of articles that may be " furnished by individual effort. *New Orleans Gas* " *Co.* vs. *Louisiana Light Co.* 115 U. S. 650. *Louis-* " *ville Gas Company* vs. *Citizens' Gas Co.*, 115 U. S. " 683. *Shepard* vs. *Milwaukee Gas Co.*, 6 Wis. 539. " *Chicago Gas Light and Coke Co.* vs. *People's Gas* " *Light and Coke Company*, 121 Ill. 530. *St. Louis* " vs. *St. Louis Gas Co.*, 70 Missouri 69.

" Hence while it is justly urged that those rules " which say that a given contract is against public " policy, should not be arbitrarily extended so as to " interfere with the freedom of contract (*Printing, etc.*, " *Registering Co.* vs. *Samson*, L. R. 19 Eq. 462), yet in " the instance of business of such a character that it " presumably cannot be restrained to any extent " whatever without prejudice to the public interest, " courts decline to enforce or sustain contracts impos- " ing such restraint, however partial, because in con- " travention of public policy. This subject is much " considered and the authorities cited in *West Vir-* " *ginia Transportation Co.* vs. *Ohio River Pipe Line Co.*, " 22 W. Va. 600; *Chicago &c. Gas Co.* vs. *People's* " *Gas Co.*, 121 Ill. 530; *Western Union Telegraph* " *Co.* vs. *American Union Telegraph Co.*, 65 Ga. 160."

The opinion in the Trans-Missouri case proceeds to intimate that this was not the decisive ground for the decision in the Gibbs case, inasmuch as the agreement condemned in that case was absolutely prohibited by a special statute, and then explains the particular purpose for which the extract is made as follows:

" The above extract from the opinion of the " Court is made for the purpose of showing the differ- " ence which exists between a private and a public cor- " poration—that kind of a public corporation which,

"while doing business for remuneration, is yet so con-
"nected in interest with the public as to give a public
"character to its business—and it is seen that while in
"the absence of a statute prohibiting them, contracts
"of private individuals or corporations touching upon
"restraint in trade must be unreasonable in their nature
"to be held void, different considerations obtain in the
"case of public corporations like those of railroads
"where it well may be that any restraint on a business
"of that character as affecting its rates of transporta-
"tion must thereby be prejudicial to the public interest."

It is not very easy to understand the precise significance of these observations. Do they mean, what at first they seem to say that, at common law, there are rights of contracts which corporations engaged in public business are precluded from enjoying, which *individuals engaged in the same business* may yet freely enjoy? If they do mean this, the proposition seems entirely novel. No authority sanctioning such a doctrine is known to the undersigned, and none is referred to in the opinion.

It is true as stated in these observations that such corporations "owe duties to the public;" but what is meant by saying that they are "of a higher nature than that of earning large dividends for their shareholders"? Are these duties any greater, or other, than those of private individuals would be if the latter were engaged in the same business? If any duties or obligations are created by accepting grants of public franchises are they not duties arising upon *contract*, and fully performed by the furnishing of the public facilities which are afforded by the exercise of the franchise? Is the relation between the railroad companies and the public usually initiated by the efforts of the companies seeking to acquire the franchises, or by offers on the part of the public to bestow them? If the railroad companies owe duties to the public, does not the public also owe duties to them? Do they owe any duty to the public other than that

of operating the franchise bestowed upon them by furnishing the money needed for its exercise, and by carrying freight and passengers with comfort, safety and despatch and for a reasonable price? And if they perform this duty is it not the duty of the public to allow them the same liberty in the conduct of their business as private carriers engaged in the like business enjoy? And if the latter are at liberty to save themselves from the ruin which comes from unfair and destructive competition by agreements with each other, must this privilege be denied to those who, under corporate forms, have, at the public solicitation, accepted grants of public franchises and faithfully performed the conditions of the grants, and they be compelled to do business at a loss, or abandon the enormous sums they have invested? When the State intentionally subjected them to the stress of competition, certain to bring ruin unless it were avoided by an agreement which unincorporated individuals engaged in the same business were at perfect liberty to make, did it not come, in justice and fairness, under a duty to allow them the same means of safety?

It is true also that the business of the railroads closely affects "almost all classes in the community—the farmer, the artisan, the manufacturer and the trader"—but is it the right of these, or of any classes, that railroads should be condemned to a ruinous competition and be deprived of the only method by which they can escape it when these same classes have the privilege of employing not only this method of escape, but others beside? Nay, is it to the interest of any class in the community that another class should be condemned to do business under ruinous conditions from which all other classes are permitted to protect themselves; and, particularly, is it in the interest of any part of the public that every substantial requisite of a good and efficient railroad service should be sacrificed to the mere apprehension of a monopoly which both reason and experience declare unfounded? Are

the Inter-State Commerce Commissioners, the supervisors appointed by the Government itself to watch over, *in the interest of the whole public*, the business of inter-State transportation, wholly in error in the declarations over and over made by them, that competing railroads should, and ought, for the benefit of the public no less than for their own benefit, come into concerted arrangements as to rates?

It will be observed that the case of Gibbs *vs.* Baltimore Gas Co. (130 U. S. 396), furnishes no color of support to the view that any different rule is to be applied to the case of agreements between *corporations* engaged in business of a public nature from that which obtains in relation to agreements between *individuals* engaged in the like business.

But was anything said by Mr. Chief Justice Fuller which supports the suggestion that corporations engaged in so-called *public* business are precluded from making agreements which, not containing any *direct* restraint upon trade, do contain some restraint upon *competition*, though not greater than that which persons or corporations engaged in *ordinary* business might create by agreement? We cannot perceive that there is; indeed it is quite certain that there is not. The *restraints* of which the learned Chief Justice was speaking were not *indirect* restraints like those upon *competition* in business, but *direct* restraints upon *business itself*, such as the case before him presented an instance of. The agreement which was the subject of inquiry in that case was between gas companies in Baltimore, and contained a covenant on the part of one of them not to exercise, beyond a certain limit, its corporate powers. This was fatally objectionable on two grounds: first, there was statute of the state expressly forbidding it; and *second*, it was an abandonment, *pro tanto*, of the duties which the company owed to the public. It was to this last feature of this agreement that the passage cited by Mr. Justice Peckham related. The doctrine suggested was that while,

if the covenant had been entered into by a corporation engaged in *ordinary* business the question would be whether the *direct* restraint thus imposed upon the prosecution of its business by the company was such a reasonable restraint as, under the ordinary rule respecting direct restraints of trade, was allowable, yet a different question arose when it appeared that the company was chartered for a business of a public nature; that in such cases no abandonment of the corporate business should be permitted.

That these observations were not intended for the case of a mere *possible*, *indirect*, restraint arising from a check upon competition is manifest from the fact that the agreement contained a *pooling* provision *absolutely doing away with competition* between the parties; and the learned Chief Justice said nothing in condemnation of this, but eliminated it from the discussion, saying, "Nor are we called upon to pass upon the validity, generally, of pooling agreements" (p. 411).

Nor is there anything in the authorities referred to by the learned Chief Justice in any way favoring the notion that parties engaged in public business, whether natural persons or corporations, are precluded from entering into any agreements regulating competition which persons engaged in ordinary business may make. Indeed, the authorities were not referred to as sustaining any such view; but let the authorities themselves be examined on this point.

The first case referred to is West Virginia Trans. Co. *vs.* Ohio River Pipe Line Co. (22 West Va. 600). We there find a paragraph (p. 625) stating, in the same language as that employed by Mr. Chief Justice Fuller that "if there be any sort of business which, from its "peculiar character, can be restrained to no extent "whatever without prejudice to the public interests, "then the courts would be compelled to hold void "any contract imposing any restraint, however par-"tial," &c., &c. and it proceeds to say that rail-

roading and telegraphing are such business. But what sort of restraint was here spoken of? Was it the *indirect* restraint growing out of traffic agreements, regulating competition, and which may or may not operate as a real restraint upon trade? Far from it; the sole question in the case was concerning the validity of an agreement between an individual land owner and a Pipe Line Co., whereby the former covenanted to give *an exclusive privilege* to the latter to lay pipe lines under his land. Of course, if one land-owner could do this, all could do it, and a most serious restraint would be imposed on furnishing to the public these important facilities. It was this kind of *direct* restraint, arising from exclusive grants, to which the court alluded, and the validity of these alone was the question in the case. And the authorities upon which the court relied were those holding that a railroad company could not make a valid *exclusive* grant to a telegraph company to operate a telegraph along its tracks. Such grants, of course, cannot be made. They assume the privilege of directly creating *monopolies*. Private individuals cannot do this; it is the prerogative of the State alone.

The next authority cited in the opinion under notice is Chicago, &c. Gas Co. *vs.* People's Gas Co. (121 Ill., 530). The question turned upon the validity of an agreement by which the gas companies sold out their establishments and covenanted not to exercise their corporate powers and duties for the space of one hundred years. Now, whether an ordinary manufacturing company could enter into such an agreement or not, no one will doubt that a gas company chartered to transact a business of a public nature cannot disable itself from the exercise of its powers, and such was the decision; and here we find the West Virginia case referred to, and the very language employed in that case quoted. Of course it meant the same thing, and the same thing only. It seems that Mr. Chief Justice Fuller, then at the bar, was of counsel in that case, and it seems clear that this was the doctrine

which he had in mind when he repeated the same language in Gibbs *vs.* Baltimore Gas Co.

The other authority referred to by him is Western Union Telegraph Co. *vs.* American Union Telegraph Co. (65 Ga. 160). The case turned upon the validity of contracts by certain railroad companies giving *exclusive* rights to the Western Union to use their tracks for telegraphic purposes. The Court, without touching upon the question whether any restraints upon business of a public nature were allowable, simply held that these were attempts to convert property already condemned to *public* use to the creation of a *private monopoly* in the furnishing of a public facility.

It will be seen, therefore, that the suggested distinction between persons engaged in business of a public nature and those engaged in ordinary business which forbids the former, and permits the latter, to into agreements which may restrain *competition merely*, has no support in the authorities referred to; but if it be taken, as it should be, in connection with the real facts of the case, it simply means that public business, like furnishing gas, shall not be *directly* hindered and restrained either by corporations chartered to carry it on agreeing not to exercise their corporate powers, or by attempts on the part of owners or possessors of land necessary to such business attempting to make *exclusive grants* of privileges to carry it on, and thus to create monopolies in the public facilities necessary to the business of life—a a sound doctrine, supported both by reason and authority.

In all probability it was in the latter sense only that the language was employed, and this is inferable from the expressions which follow it, in which it is said (p. 410): "Innumerable cases, however, might be "cited to sustain the proposition that combinations "among those engaged in business impressed with a "public, or *quasi* public character, which are mani- "festly prejudicial to the public interest, cannot be "upheld."

To the doctrine as thus stated we take no exception. It makes the validity of the contract dependent upon its actual effect upon the public interest. What we contend for is that agreements among parties engaged in such business which impose no *direct* restriction upon trade, which contemplate that all parties to the agreement are to continue to do their business, and as much as they can, but seek to prevent abuses in it, and to regulate, but not to destroy, competition, are not to be *deemed* prejudicial to the public interest, and invalid for the reason that the parties are engaged in a business of a public nature. It is only against the doctrine that the inquiry as to the *actual effect* of such agreements is not *open* that we contend. What we respectfully submit is that in such, as in all other occupations, private regulation by agreement *may be*, in the highest degree *promotive* of trade, and *promotive* of the *public* interest, and, when so, cannot be included within the class of contracts made criminal by the Anti-Trust Act as being in restraint of trade. Mr. Chief Justice Fuller could not have intended anything contrary to this, for he proceeds to state: "Nor are we called upon to pass upon the validity generally of pooling agreements." Now, if any agreement imposing a "partial restraint" precluded inquiry into its *actual effect*, a pooling agreement certainly would.

The reference, therefore, in the opinion in the Trans-Missouri case to the language employed by Mr. Chief Justice Fuller in Gibbs *vs.* Baltimore Gas Co. if intended to support any view to the effect that persons, whether natural or artificial, engaged in business of a public nature could make no agreements with each other containing any restraints, direct or indirect, seems not to the purpose.

But we are not content to leave the subject here. We desire to make it clear and undisputable, as a matter of authority, that this question whether agreements between such persons are injurious to trade de-

pends always upon the *actual effect* of such agreements upon trade, such effect being determined by the character of the agreements and the purpose in view as shown by the agreements themselves, and *the facts* of the situation which called them forth and to which they were to be applied.

The State of New York by its Revised Statutes of 1830, in formulating the law of conspiracy, made a conspiracy to do any act "injurious to trade or commerce" a misdemeanor. This was precisely the same *kind* of legislation as the Anti-Trust Act of Congress; and the question upon any indictment would be one concerning the *actual effect* of any act charged as a crime, namely, is it or is it not, "injurious to trade or commerce?" just as in the case of the Federal Statute the question is whether it is or is not in restraint of trade or commerce between the States. This is necessarily a question of fact, although, doubtless, in some cases the provisions of the contract, if there were a *direct restraint*, such as an agreement by some railroad not to carry goods except for a price admitted to be exorbitant, would of themselves be conclusive of the injury or restraint, and, therefore, require a decision condemning the agreement without other evidence. But, in other cases, other facts would have to be looked to, such as the circumstances under which the agreement was made and the probable purpose of the parties.

In the case of the People *vs.* Fisher (14 Wend. 9), an agreement between journeymen shoemakers not to work for less than certain wages was charged as an unlawful conspiracy under this statute, and the question whether it was so was treated as depending upon the *actual effect* of such an agreement upon trade or commerce, and the judgment was that such effect was injurious. This conclusion was probably erroneous. It would not now be followed; but what we cite the case for, is to show that in a case of a similar statute to the one under

inquiry, the question was treated by the court as one concerning the actual effect of the agreement. It was not, however, the case of a business of a public nature.

In the case of Hooker *vs.* Vandewater (4 Den. 347), the question arose in respect to an agreement between parties engaged in business of that character. The owners of several lines of canal boats united together in an agreement of a pooling nature. They agreed "*to stock*" all their earnings and divide them in certain designated shares among the parties, and "to establish rates of freight and passage to "govern the association, which rates so established "shall be signed by the parties in interest, and be "conclusive." There was no agreement that the prices should be fair or reasonable, nor any provision designed to make them so, and competition was absolutely suppressed during the whole period of the agreement, and not merely for a few days in order to give parties notice of a change in rates and enable them to compete fairly. The agreement contained a recital that it was "for the purpose of establishing and main-"taining fair and uniform rates of freight, and equal-"izing business among themselves, and to avoid all "unnecessary expense in doing the same." The action was brought to enforce the payment of a sum due under the contract, and the defence was that the contract was in violation of the statute. The court treated the question as one concerning the *actual and intended effect* of the agreement upon trade and commerce, and held it was in violation of the statute. It did not intimate that if the agreement had been one really designed to regulate the business and do away with ruinous competition, it would have been injurious to trade or commerce. On the contrary, it declared that "the object of the agreement, as expressed in the written contract was plausible enough; but it is impossible to conceal the real intention." This case is very pertinent in two respects: (1) It shows that in the case of just such a statute as the Anti-

Trust Act, the true inquiry is as to the actual effect of the contract, and that this involves the question of the purpose of the parties; (2) But it goes further and shows that such an agreement as ours would have been held entirely innocent. Let it be supposed that in this case it had appeared that the parties had been suffering from a *secret and illegal* competition, carried on by a violation of law, and that the agreement they made did not seek to prevent competition, but contemplated and provided for it, by requiring that all parties proposing to compete by a change of rates, should first comply with the law requiring the rates to be published, and should give notice of their intention to the others, so that all should start fairly, there can be no doubt that the court would have upheld the agreement?

Soon after another case upon a similar canal boat agreement arose upon the same statute, (Stanton *v.* Allen; 5 Den. 434.) The objection was now made that the agreement was illegal at common law as well as a violation of the statute, and so the court held; but the question was decided in the same way, as one turning upon the actual and intended effect of the contract. Had its provisions been so shaped as to make it appear that the parties had in view, not a monopoly by a suppression of competition, but simply security from ruinous and illegal competition, it is certain that the court would have upheld the agreement. It said: "Its (the agreement's) professed ob- "ject and purpose was the establishment of fair and "uniform rates of freight, and to equalize the busi- "ness among themselves. These rates were to be "determined by a committee and to extend to the "transportation of both passengers and freight. "While the introductory terms of the agreement pro- "posed nothing apparently objectionable, the ulti- "mate object is very manifest, and is of a different "character." This learned court perceived no objec-

tion to an agreement permanently fixing fair rates and equalizing business. What objection can there be to an agreement which makes no such effort, but leaves the parties to it to fix such rates as they please, provided they do it openly and according to law?

In the case of C. C. & I. R. R. Co. *v.* Closser (126 Ind. 348), the question arose whether a certain railroad pooling agreement was "in restraint of trade." The court, treating the question as one depending upon the actual and intended effect of the agreement on trade, and as a question which depends in every instance on the facts of each particular case, held that this particular agreement was obnoxious to the charge; but it took especial care not to have its decision understood as implying that no agreement could be made among railroads affecting competition which would be valid. It said: "We "preface our discussion of the central question by "saying that we are not at this point dealing with a "case where a combination is formed for the purpose "preventing ruinous competition, and in which there "is no design to stifle fair competition."

In Chicago, M. & St. P. Ry. Co. *vs.* Wabash, St. L. & P. Ry. Co. the question was raised upon a distinctly pooling agreement of a permanent character in which, as already observed, the indirect restraint upon competition is far greater than in the case of the mere temporary and incidental one effected by the agreement in question. It was held that the contract was void, but upon grounds, and with implications, which fully vindicate our agreement. It was declared that "the "design of the contract on which the appellant rests "its claim is not left to presumption or conjecture. "Its purpose is apparent on the face of the instru- "ment. Its object was not to avoid ruinous compe- "tition by entering into an arrangement to carry

"freight at reasonable rates, but its evident purpose "was to stifle all competition for the purpose of rais- "ing rates. * * * To the extent of the traffic "covered by this contract—and it covered no incon- "siderable portion of the traffic of the continent— "each company practically abdicated its functions as "a common carrier and conferred them on a new cre- "ation, for the sole purpose of suppressing competi- "tion. Before they entered into this contract each "of these companies had the power, and it was its "duty, to make rates for itself, and to make them "reasonable; but by the terms of this contract every "one of the companies was divested of all its powers "and discretion in this respect." It will be remembered that in our contract no company is in any respect divested of its powers and discretion in respect to rates, but is at liberty to charge such rates as it pleases and to enter into any competition it pleases, subject only to the giving of reasonable notice and of refraining from its contemplated action during the period of that notice.

The notion, even, that a pooling agreement is a restraint on trade has never obtained any foothold in the English tribunals. In *Shrewsbury & Birm. R. R. Co.* vs. *The London & N. W. R. R. Co.* (17 Q. B. N. S.) a distinct pooling agreement was sustained. The same case came up in the House of Lords (6 H. L. Cases 652) and, though the actual decision was there made upon another point, Lord Cottingham expressed a clear opinion that the contract was not free from objection upon any ground of public policy.

In *Hare* vs. *The London & N. W. R. R. Co.* (2 J. & H. 80) a pooling agreement was distinctly sustained by Vice-Chancellor Wood, in which he condemned "the notion that the public is benefitted by pitting "two railroad companies against each other till one is

"ruined," and declared it to be a wholly mistaken view.

In addition to these authorities we again refer in this place to the case of *Manchester, &c. R. R. Co.* vs. *Concord R. R. Co.* (20 Atl. Rep. 383), from which a long extract is hereinbefore made (p. 162). The distinguished text-writers, also, Redfield and Morawetz, referring particularly to railroad companies, declare that the notion that agreements between such companies, designed to prevent ruinous competition, are in any way opposed to public policy, as in restraint of trade or otherwise, is wholly unfounded. (1 Redfield on Railroads, Section 146; Morawetz Law of Corporations, Second Ed., Sec. 1131.)

If we turn, for a moment, to the point of principle, how is it possible to sustain the notion that agreements between the operators of public franchises like railroads, simply designed to protect themselves against ruinous competition, are a restraint upon trade, or in any way opposed to public policy, any more than agreements between individuals or corporations engaged in ordinary business? If there were any distinction at all between the two cases it should be in favor of such agreements between railroad companies. With them competition is *involuntary*. They are obliged by law to continue to do the business. With those engaged in ordinary business competion is wholly *voluntary*. They are not obliged to do business by law, and can shift their capital into other pursuits which railroads cannot. We repeat what we have heretofore argued at greater length, that the railroad business, having been subjected by the deliberate policy of the public to free competition, and those who are engaged in it being *obliged by law* to carry it on, and being unable to retire from it, any law or doctrine which would deprive them of the power, not of destroying or breaking up the competi-

tion, but of so *regulating* it as to break up an *illegal, unfair* and *ruinous* competition, would be absolutely shocking to the sense of justice.

But we have not quite done with the authorities. We have endeavored to show that there is no radical distinction between private individuals and corporations in respect to the lawfulness of contracts regulating competition, nor between persons, whether natural or artificial, engaged in business of a public nature, and those engaged in ordinary business, in respect to the same privilege. But although there is no *radical* difference, it is yet true that the courts do regard somewhat differently contracts of this description when entered into between persons engaged in business of a public nature and those engaged in ordinary business. There are two characteristics commonly attending business of a public nature such as the operation of railroads. The first is, treating the service that is rendered, as it may well be, as a commodity, it is a commodity needed by almost all the members of the community and is, to a greater or less degree, *necessary* to them. The other is that the business in most instances requires the aid of a public franchise and of such large investments that an additional supply of the service cannot be immediately furnished. It is not fit that private individuals should be at liberty to increase their own emoluments at their own will, and this leads very justly to a closer scrutiny of agreements of the character in question in these cases and to a condemnation of them whenever it appears that there is a purpose to employ them to suppress, instead of to regulate, competition. Agreements *designed* to exact high prices for transportation it may reasonably be supposed will be used for that end. That was the purpose of making them, and the necessary effect of such agreements is to restrict and restrain trade which is at all dependent upon transportation, while agreements designed only to *regulate* competition, to secure reasonable prices only, and to make them stable and

uniform, are in every point of view, directly calculated to promote trade.

We do not understand it to be suggested in the opinion in the Trans-Missouri case that agreements simply designed and operative only to restrain ruinous competition are in any manner objectionable when entered into by persons engaged in *ordinary* business. They have been repeatedly sustained, and, it is believed, nowhere condemned. But agreements between even such parties, when calculated and designed simply to raise prices by suppressing ordinary competition, are equally obnoxious to the law. It will be enough to refer to the authorities without extensive citations from them. In re Wiggins *vs.* Evans, 3 Y. & J. 318; Perkins *vs.* Lyman, 9 Mass. 522; Schranker *vs.* Scharinghausen, 50 Mo. Ap. 522; Sayer *vs.* Louisville Union Benevolent Association, 1 Duval, Ky. 142; Collins *vs.* Locke, 4 Law Rep. Ap. Cases, 674; Central Shade Roller Company *vs.* Cushman, 143 Mass. 355; Gloucester &c. Co. *vs.* Russia Cement Co., 153 Mass. 92.

The opinions of the Interstate Commerce Commission so frequently expressed should be allowed great weight, even upon the legal question. It is said in the opinion in the Trans-Missouri case (166 U. S. 338) that this Commission "has never distinctly "stated that agreements among competing railroads "to maintain prices are to be commended, or that "the general effect is to be regarded as beneficial." Surely it cannot be intended to be intimated that this Commission has not repeatedly and in the most distinct manner commended agreements among railroad companies *to regulate competition and to check ruinous competition*. The passages herein already cited from the decisions as well as the reports of that body, abundantly establish this. (See *supra* pp. 107-129.)

But how can any doctrine, if there were any such, making a distinction between agreements supposed to restrain trade when made by persons engaged in em-

ployments of a public nature and those made by persons engaged in ordinary business, or between such agreements made by natural persons and those made by artificial persons, be properly involved in the construction of a statute making *all* contracts combinations and conspiracies in restraint of trade, in respect of whatever trade or between whatsoever parties, criminal? The statute neither makes nor permits any such distinction. The only question which can be made in any case is: Does the contract or combination rainrest trade within the meaning of the statute? Indeed, the suggestion of such a distinction assumes that the statute was levelled especially against railroads, whereas it is admitted that there was the greatest doubt in the minds of the legislators who enacted it whether it was applicable to railroads at all.

II.—In connection with the subject of authority it is pertinent to observe that the statute in question attempts *no new definitions* of restraint upon trade, or conspiracy, or monopoly. It leaves the whole body of the law unchanged upon those points. Whatever before the act was not a restraint upon trade, or a monopoly, is not such now.

1. It will not be uninstructive to glance at a chapter of history relating to legislation on the subject of public policy and learn the consequences of errors which Congress was wise enough not to imitate.

Some centuries ago, when trade and commerce were on a narrow scale, and the facilities for transportation and communication small, certain occupations were carried on which were thought to have, and in many

instances, doubtless, did have, an injurious effect. The market towns were the principal places in England where supplies of flour, provisions, &c , were to be procured, and there was a class of men called *forestallers*, who found a profit in going out and meeting the market wagons as they came in from the surrounding country and purchasing their stocks with the view of exacting largely increased prices from the daily necessities of consumers. Others carried on other speculative operations called *regrating* and *engrossing*, by which they insinuated themselves between the producer and the consumer, in order to make a profit out of the latter. Some of these operations were probably of an oppressive and mischievous tendency, injurious to trade, and might perhaps, had proper distinctions been observed, have been made the subjects of penal law. But Parliament, overlooking the vital principle which enjoins freedom of trade, and losing sight of the many public advantages now admitted to come from some of the pursuits thus prohibited, undertook to prohibit them all, and from time to time statutes were enacted, aggregating in number more than forty, and with constantly increasing severity, by which *new statutory definitions* of things supposed to be of public injury to trade were made. But bitter experience, after a time, taught the lesson, that, in the attempt to abolish bad practices, care must be taken not to embrace what is good. It was found that these very statutes, designed to benefit trade, resulted in working the greatest mischief to it. Many repealing acts were passed by which those statutes supposed to be most objectionable were abrogated, but all of them were eventually found to be more productive of mischief than of benefit, and finally all were repealed. But even then the work of correction was not complete, for assertions were made that some of these statutory offences were offences at common law prior to the statutes, and prosecutions were still kept up, until a final act was

passed sweeping utterly away all the statutes and the common law, if there were any such. One of these statutes recited in penitential shame, "that it had "been found by experience that the restraints laid by "several statutes upon the dealing in corn, meal, flour, "cattle, and sundry other sorts of victuals, by pre-"venting a free trade in the said commodities, have "a tendency to discourage the growth, and to en-"hance the price of the same, which statutes, if put "in execution, would bring great distress upon the "inhabitants of many parts of this kingdom, and in "particular upon those of the cities of London and "Westminster;" that is, that the legislation was found to have an effect precisely the opposite of what was intended.

By several other statutes the British Parliament undertook to interfere with the business of carriers by providing for the establishment of maximum rates. In more enlightened times the error of this step, and the unwisdom of interfering with the ordinary operation of the natural laws to which competition is subject were in like manner confessed by a most penitential repealing statute.

A perusal of these repealing statutes will be found instructive, and the three principal ones are printed in an Appendix to this brief.

EIGHTH POINT.

The agreement is in no manner in violation of the provisions of the second section of the act. It creates no monopoly, nor is it an attempt, or conspiracy to monopolize.

1.—It does not embrace or attempt to combine all

the competing parties. It does not include all the through east and west railway lines and no lines of canal or other water transportation. So long as they are outside of the agreement there can be no pretence of a monopoly.

2.—Even if it did include all competitors, an agreement which leaves all the parties open to permanent competition with each other, creating at the most a temporary restraint for thirty days in order to insure notice has no feature of a monopoly.

The foregoing completes our intended argument upon the question whether the agreement is, *in fact*, in restraint of trade or commerce, or for a monopoly. It reaches far beyond the point of mere reasonableness and demonstrates its *necessity;* its necessity not only to secure the general harmonious operation of the system of railroad transportation, but also to secure stable, uniform, published rates. The only real obstacle to the attainment of these is, *secret* and because secret, *unlawful*, competition. To do away with this is the *sole* object of every provision in the agreement which is challenged by the present action. A positive enactment of law required the real rates to correspond with the published ones. These provisions are simply a scheme by the aid of which, and of which alone, obedience to the law may be secured. And this is what those who have moved the present action declare to

have been prohibited and made criminal by the Congress of the United States!

NINTH POINT.

In the attempt, made by the bill, to array every possible objection to the agreement, there is an evident purpose to suggest that its Eighth article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of Section 5 of the Interstate Commerce Act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce Law.

I.—The term "pooling of freights," taken by itself, and without reference to any known practice existing prior to the passage of the act, is absolutely indefinite and uncertain, and for that reason ineffectual. No one can say what its meaning is.

II.—If its meaning can be ascertained only by *proof* of the prior existence of some practice known as "pooling freights," allegations of the existence of such practice would be material and essential to the bill of complaint; and for the want of them, the action cannot be maintained.

III.—If the meaning of the language "pooling of freights" is to be sought from practices existing prior to the act so *notorious* that Courts may take *judicial notice* of them, the action must fail, for there were no practices describable by the term "pooling" possessing that requisite notoriety.

IV.—Should the Court, however, feel inclined to find, from some source, some meaning of this term "pooling of freights" sufficiently definite for the purposes of penal law, the attempt will immediately land us either in uncertainty, or in a conclusion that it describes something quite different from anything agreed upon in this traffic association agreement.

1. We must begin by defining, as far as we can from the language itself, the term "agreement for the pooling of freights;" and, first, what the term "pooling" means, for the obscurity begins here. Strictly speaking, it must mean the bringing together into a common receptacle of different parts of the subject received, in the first instance, by the different parties and to be pooled, to the end that the aggregate should be *distributed among them in certain proportions, as being the common property, in such proportions, of all.* In this sense there is no violation of the Interstate Commerce Act, for no one will pretend that the agreement provides for, or contemplates, such actual and physical pooling. It may be said, however, that this interpretation is too rigid, and that the main purpose being division, it would be "pooling" if the subject agreed to be pooled were *treated*, for instance, by keeping an account of the merchandise

received by each road and assigning to each, by charging and crediting, its proper share, *as if* it were thus brought into a common receptacle for the purpose of such division, and so divided; and we are willing to adopt this larger meaning.

2. But what does "freight" mean? Does it mean the physical merchandise to be carried, or the money compensation received for carrying it? These are very different things and a prohibition of the one would by no means be the prohibition of the other. The act elsewhere employs the word in *both* significations—in the 7th section as meaning property shipped, and in the 20th as the *charge* for the property shipped. Here we are again landed in an *uncertainty* which cannot be cleared up, at least with that distinctness which the penal law requires. The bill itself confesses this uncertainty by alleging that the agreement means *both* things? It charges an agreement to combine the physical traffic *and* to divide the earnings.

The best construction would seem to be to make the word "freights" mean the *compensation* for the property shipped—that is, the same thing substantially as is subsequently described as "earnings." It will be observed that by the grammatical structure of the section it is only the *agreement* to pool which is prohibited. In the case of "earnings" an *agreement* to divide is not prohibited, but the *act* of division is. If these terms mean *different* things, why is not the *agreement* to do them prohibited in each case? But if we understand them as meaning the *same thing*, then both the *agreement* and the *act* are prohibited. The draughtsman apparently thought it important first to prohibit the *agreement* to divide *earnings*; and, then thinking that the mischief might be accomplished by actually dividing them *without* agreement, he proceeded to punish the

act itself. This construction is made somewhat more probable by the concluding sentence. So far as the *agreement* was concerned, there could be, in the absence of special provision, but a single breach and a single offence. The draughtsman wished to increase the punishment, and therefore made each day's continuance a separate offence; but this he did only in the case of the *agreement*. In the case of the *act*, there was no need of it; for, from the nature of the case, the acts would be separate, and each of them distinct offences, and so multitudinous as not to require, for purposes of severity, any form of multiplication.

3. Upon the construction above suggested, the action cannot be maintained, for it will not be pretended that there is anything in the agreement looking to a division of the *earnings* from *competitive* traffic; and if there were it would not matter, for the mere *agreement* to divide those is not prohibited; and there is no ground for changing the grammatical construction, which makes "to divide" immediately dependent on "unlawful" and make it dependent on "contract agreement or combination." If this latter had been intended, the language should have been, "*for the division* between them," etc.

V.—But let all uncertainties be put out of sight, and the assumption be roughly and boldly made, in the teeth of the grammatical construction, that "freights" means the physical traffic; there is nothing in the Eighth Article of the agreement or elsewhere which violates the fifth section of the Interstate Commerce Act.

1. One thing is clear, the defendants have done nothing but enter into an *agreement*. They are charged with no other act. If this is not an agreement for the "pooling" of freights it is no violation of the prohibition; and it certainly is *not*.

Pooling, as has already been shown, if we assign to the word the most comprehensive meaning possible, has yet some essential features; and the main one is that the thing pooled, be it the physical traffic, or the money received, or receivable, for carrying it, be actually brought, or contemplated and treated *as if* brought, into a common receptacle *as being a subject belonging to the parties in common in certain definite proportions*, to the end that it may be divided in such proportions between them. Whatever may be the means employed to effect this object, one thing is essential; namely, *a definite right in each party* to a *definite share* of the *things pooled*; a right susceptible of legal enforcement. No pooling agreement had, it is entirely safe to say, been known at the time of the passage of the Interstate Commerce Act which did not confer such rights. No railroad company would have seriously thought of entering into anything in the nature of a pooling agreement, which did not secure this right. It is immediately obvious that no such right, nor anything approaching it, is secured by the agreement in question. What is done, and all that is done, or contemplated, is contained in the clause "The Managers are charged with the duty of securing to each company, party hereto, equitable proportions of the competitive traffic covered by this agreement so far as can legally be done." No one can pretend that any enforceable right whatever, in any traffic whatever, is conferred upon any party by this language; and unless such a right is conferred no *pooling* is effected, or agreed to be effected.

If there were such a right it could be enforced by

action. What would a plaintiff in such an action have to do in order to make out a case?

First.—He would have to prove what *his share* in the competitive traffic was; and this with certainty, as being 20 or 30, or 40 per cent., or some other share equally distinct; and this, it is at once apparent, he could not do. How could he prove what was *equitable?* Courts of equity sometimes say, when they have no other lights to guide them, that *equality is equity*. Was it intended here that the rivals should participate equally? We know better than that. What then was to be the guide? Should it be the amount of *capitalization*, or the *expense of maintaining* the road, or the relative *capacity* of the road to carry? None of these things certainly could have been intended. Could it have been the *usual* amount it had *before* received; or the amount which under prior agreements had been *allotted* to it? This could not be, for it is notorious that none agreed that these were *equitable*. All were always complaining. And, besides, the *circumstances*, such as ability, opportunity, expense, and every other element which might affect what was *equitable* were changing every day.

It is entirely manifest that by *equitable* no definite share was intended, but that the intention distinctly was to have it *indefinite*, and leave the judgment and discretion of the managers absolutely unhampered.

Second.—What would be the plaintiff's next step? It would be to prove that it had not secured its share, but that a part had gone to others; but this would amount to nothing. No right of action is given, or contemplated, against other parties to the agreement in such a case. Each has the right to carry everything offered to it, and *to retain the entire compensation*. The sole right the plaintiff could assert would be against the managers for a failure to perform their *duty*.

Third.—The plaintiff would, therefore, be bound to proceed further and show that there was some *lawful act which the Managers might and ought to have performed*, which would have directed traffic from rival lines to itself, and have helped to make up the deficiency. We say *some lawful act;* for the agreement was carefully drawn so as not to call upon the managers to do any unlawful thing.

We now see precisely the force and effect of the agreement in the particular under consideration. It does not attempt to pool traffic or earnings. It gives no right in either to any party. No moneys received by one can ever be recovered from it by another. No party can ever effectually demand that a pound of freight should be directed to its line which would otherwise go to another. The only thing done is to make it the duty of certain persons called "managers" to bear in mind that it is highly important that each party to the agreement should receive what in their judgment is an *equitable* share of the competitive traffic, and that if there are any *innocent and lawful things* which they may do, which would tend to secure that object, they should do them.

2. No "pooling of freights," other than by a division, principally, or incidentally, of the gross or net receipts of the earnings can be made by railroad companies. "Pooling," as already shown, means the bringing together of various parts of the thing pooled into a common receptacle to the end that it may be divided in specific shares among those to whom it is assumed to belong. It is immediately obvious that this cannot be done with the *physical tonnage*. The difficulty and expense of thus handling the competitive tonnage of the great trunk lines, received at points hundreds of miles apart, would, of itself, make such a thing utterly impossible. But, besides that,

such a treatment of actual merchandise destined for shipment assumes that it is *in the power* of railroad companies so to treat it, which is a wholly false assumption. Most of the traffic is destined by its owner to be carried by certain lines, and must be so carried. An unlawful diversion of it would not be dared by the railroad companies. Not only would it involve pecuniary liabilities which would under no circumstances be assumed, but every such trifling with the wishes of shippers would involve great loss of business to the parties guilty of it. The money receipts indeed can be thus dealt with, for they are in the power of the railroads, and can be transmitted from place to place without expense. Some considerable control can indeed be exerted over unrouted traffic, and a great deal more in the way of equalization may be effected by inducing shippers to send by one line rather than by another.

All that the roads themselves have legal power to do is to *treat* the traffic *as if* it had been thus pooled, and this may be effected either by transmitting all the gross or net receipts to a designated depository; or by having each company keep an account of such receipts, and make those receiving an excess pay over that excess to a depository for distribution among those who have received less than their respective shares. No pool of railroad freights has ever been known which did not adopt one or the other of these methods. No other is possible.

An account and division of earnings, therefore, is a necessary part of every pool. No company could stop taking freight after it had received its own share. It could not refuse to carry any thing offered. This is fully recognized by the statute in question, for the division of money earnings is expressly and separately prohibited.

It is a necessary consequence of the foregoing that the agreement in question is not one for the pooling

of freights, even if we understand "freights" as meaning the physical subjects of transportation.

3. It may be argued that the *end in view* is to bring about, as far as possible, what is vaguely called an *equitable division* of the traffic, and that this object is sought to be accomplished by *agreement*, and, therefore, that the agreement is, so far, properly described as one for the "pooling of freight." But this is not quite accurate. The end in view is perfectly described by the Eighth Article, and no other purpose can be imputed to the parties than the one there stated, namely, that the managers shall take such steps as they lawfully may, to secure to the parties equitable proportions of the competitive traffic. This is agreed to, and nothing more is agreed to; and this certainly is *not* pooling, nor agreeing to pool.

4. It may be argued that this is *evading* the statute. If by this is meant that the thing does not fall within the prohibition of the statute, no objection is taken to the statement. Violations of prohibitions cannot be asserted where the thing prohibited is not done. But if it be meant that there has been an unsuccessful *attempt* to evade the statute, but that the real act prohibited has been, in substance, though not *in form*, committed, the assertion is in no degree, or respect, true. The doing of things other than the making of an agreement for the pooling of freights, which may accomplish *some* of the ends which pooling would bring about is *not* prohibited, nor intended to be.

5. The fallacy which underlies the argument that

the Eighth Article is an agreement for the pooling of freights is that because it is designed to accomplish some of the same objects which pooling accomplishes, it is *pooling*. But pooling is a totally different thing from the objects accomplished by it; and if those *objects* are not prohibited by law, they may be lawfully accomplished by any means, other than pooling, which will bring them about. Undoubtedly one of the results of an agreement to pool is to check, though not to destroy, competition, although it does destroy ruinous competition. The view of the complainants is that this was the sole reason why such agreements were prohibited. That we do not and cannot know, but have the best grounds for believing that it was neither the sole, nor the principal, reason. If all restraints on competition were designed to be prohibited, they would all have been directly prohibited. Nothing would have been easier than to prohibit all *agreements* or *acts tending to repress, or designed to repress*, competition. But this was not done. It was industriously avoided.

6. It may be urged that under our construction of the Eighth Article which simply calls upon the managers to do what may lawfully be done to secure equitable shares of the traffic to the several parties to the agreement, the provision will be ineffective. We are sorry to say that there is much ground for apprehension that it will be. Confident expectations on this point have at no time been entertained. It is not for the reason that they thought it the best scheme for checking ruinous competition that the parties entered into it, but because they thought it was all the law permitted them to do. Had they been allowed to make an agreement for the pooling of freights, they would have made one.

At the same time, however, they are not without

hopes that the provisions will be substantially efficacious; and the principal ground of hope is that the parties will voluntarily lend their aid to such lawful methods of securing to each an equitable share of the business as the managers may adopt and recommend; and that in this way such equitable share, or something approaching it, may be so far secured that the *motives* to a deadly and ruinous competition may be in great measure removed: and that all will find it to be to their interest to put down all secret and illegitimate competition, and invoke the execution of the law against any who may engage in it.

7. It may be asked *what acts* the managers could perform which would tend to secure to the several parties equitable shares, or shares thought to be equitable, of the competitive business, other than by directly manipulating the traffic in such manner that each party should receive such share. If none could be pointed out, it would not matter, for this would not show an *agreement* to *pool*, which involves an enforceable right in each party to a definite share; nor would an *actual* manipulation of the traffic, could the managers accomplish it (which they could not), *without agreement*, be prohibited by the statute. It is not *actual* divisions of the traffic, but *agreements* to divide which are condemned. But we prefer to answer the question otherwise, and to point out the lawful and innocent things which may be done.

a. The *soliciting agents* of particular lines, heretofore the instrumentalities by which ruinous and illegitimate competition has been carried on, may be withdrawn, leaving the traffic to follow its natural channels, subject to the rates already agreed upon, which

the parties cannot change except in the way pointed out by the agreement. If these rates should turn out not to produce a living revenue to some road, the managers, may increase its traffic by allowing a differential to it, that is, permit it to carry at a somewhat lower rate, and the differential may be increased or diminished as the end in view may require. If the rates are so low that no differential would be practicable, that is, if the weak road could not carry at a lower rate and make any profit, it must relinquish business and become bankrupt.

b. If anything more should be needed, shippers who stand indifferent as to routes may be solicited to send by a particular route, and agents may be appointed for this purpose, who, being under the exclusive control of the managers, may be required to obey their instructions as to amounts for which they may solicit. Such soliciting agents, being employed by no particular interest, would be under no temptations to engage in secret or unlawful means to secure traffic.

c. Inasmuch as the hands of the several parties are tied against active and open soliciting, they cannot well prevent the operation of this scheme, without engaging in the unlawful practice of *secret* rate cutting, which will be *war*, not only against the law, but against the managers as well, and the latter will be directly interested to uncover, expose and bring to punishment such offences, and to that end, they have the power, not likely to be resisted, of examining the books and all officers of any company.

8. Possibly the point may be made (for in a

business of such importance we must anticipate every imaginable position) that although the parties to the Traffic Association have not entered into any *agreement* for the pooling of freights, they have entered into a *combination* for that purpose; but this would be a fallacy almost too obvious for elaborate exposure.

The term "combination" as employed in the statute, like the term "conspiracy" imports something *unlawful*. It must either have an unlawful *object*, or seek to accomplish a *lawful* object by unlawful *means*. Neither of *these* things appear; both the object and the means are entirely lawful.

a. Any assertion that the *object in view* was unlawful would only be a reassertion of the proposition already refuted; namely, that the thing which the parties designed was the *pooling of freights*. This was the very thing which they did *not* design. The bill of complaint alleges no act of the parties other than the making of the *agreement*. Agreement does, indeed, import *combination*, though not a criminal combination. Inasmuch as the only combination here asserted is the *agreement*, it is true that what the parties *agreed* to do they *combined* to do; and it is, on the other hand, equally true that what they did *not agree to do*, they did *not combine* to do. What they designed, and all they designed, they have fully stated, namely, *to make it the duty of the managers to use all lawful means to secure to the several parties what they might deem equitable portions of the competitive traffic*; and this is not *pooling*, for it lacks the essential elements of pooling. This being the extent of their *purpose*, must necessarily be the extent of their combination.

b. There is nothing unlawful in the means sought

to be employed. One of those methods is the agreement upon rates admitted to be reasonable. It has already been shown that there is nothing unlawful in this. Another of the methods pointed out by the agreement is the abandonment of separate and independent soliciting agents. This surely is not unlawful, No person can be *obliged* to enter into competition with others in any business; still less to employ those methods the operation of which is fruitful of both public and private mischief. Independent soliciting agents are the very means by which ruinous, illegitimate and unlawful competition is carried on.

Another of the methods may be that of the appointment or allowance by the managers of soliciting agents with the view of securing traffic to roads which might otherwise not obtain an equitable share. What is there of an unlawful nature which can be suggested in this? Let it be supposed that the hack drivers in great cities, where the rates had become fixed either by common consent or municipal ordinance, should become impressed with the mischiefs and nuisances which have been observed to a greater or less degree by every one, springing out of unrestrained and fierce competition, such as the deafening yells, lying representations, and pulling and hauling, amounting to almost to personal assault, by the coachmen, and should make an agreement for the cessation of these practices and the appointment of paid agents who should gently guide those wishing conveyance, so far as they might be willing to submit to such guidance, to a coach, recognizing the superior claims of those who had the best equipment, but attempting, so far as possible, to furnish some employment for all; would this be thought to be unlawful, or in any manner tending to the public injury? But yet this is all which is attempted by the provisions substituting soliciting agents acting under the supervision of managers in the place of individual agents for each company.

Another means which may be employed is the allowance of a differential in favor of a weaker party who may need it. A rival who labors under a disadvantage has no means of gaining business except by cutting under. Such cutting under, if made in the course of unrestrained competition, naturally tends to, and will usually result in a corresponding cut by the more powerful contestants, thus compelling the weaker one to make a further cut, and so on to the point of exhaustion and destruction of the latter. Can it be unlawful for the strong ones to *agree* that they will not drive the weak ones to suicide? This point has been already fully covered.

But, finally, the clause "so far as can legally be done" is a short and conclusive answer to any charge that the agreement is a violation of the prohibition of the Interstate Commerce Law against pooling. *There is no agreement to do any particular thing whatever.* The agreement is that it shall be the duty of the managers to bring about a certain result, namely, equitable proportions of the competitive traffic, so far as they legally may. If there are any efforts which may lawfully be made to bring about this end, there is an agreement that they shall, or that some of them shall, be taken. If there are no such efforts, then there is no agreement to do anything. If it were unlawful, or made unlawful by the Interstate Commerce Law, for railroads to take steps, by diverting unrouted traffic, to a particular line, to give it what might be thought its equitable share of business, or to accomplish the like result by inducing shippers to give traffic to it, then there is no agreement to do these things; and if any of the parties to this agreement were to bring any action based upon the allegation that the managers had not done such things, would any Court think for a moment that the action could be sustained after the illegality had been pointed out? The following authority is directly in point:

Davies *vs.* Davies, 36 Ch Div. 359, 393.

It was urged in the Court below that the *purpose* of the parties in inserting this clause was to *pool*, and that the clause "so far as may legally be done" was framed as a device to enable them to escape punishment; in other words that *they did not really mean what they said*. But no such argument can be made in this action. In this action the question is what the parties have *really agreed* to do, and that is to be determined by a correct interpretation of their language; and in the work of interpretation we must necessarily assume that parties mean exactly what they say. The same rule must be adopted as if the suit were by one of the parties against the others, or against the managers, founded on an allegation of a breach of the agreement.

It must be borne in mind that this action is based upon the *agreement* alone. No *acts* in the nature of pooling are alleged. If the roads, after making the agreement, had actually proceeded to pool the traffic in a manner indicating a common purpose to do it, they might be indicted under the act for a *conspiracy* to pool, and the agreement might have been given in evidence to prove the conspiracy, notwithstanding the saving clause against illegality, and then the suggestion that this clause was introduced as a device might legitimately be made.

Lastly.—The decree should be affirmed.

JAMES C. CARTER,
LEWIS CASS LEDYARD,
Of Counsel for
Joint Traffic Association.

APPENDIX.

Statutes at Large, 12 Geo. III. (Vol. 29),
Cap. LXXI.

AN ACT for repealing several laws therein mentioned against badgers, engrossers, forestallers, and regrators, and for indemnifying persons against prosecutions for offenses committed against the said acts.

Whereas, it hath been found by experience, that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to enhance the price of the same ; which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and, in particular, upon these of the cities of London and Westminster ; be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same. That an act made in the third and fourth year of King Edward the Sixth, intituled an act for the buying and selling of butter and cheese ; and also an act, made in the fifth and sixth year of King Edward the Sixth, intituled an act against regrators, forestallers and engrossers ; and also an act made in the third year of Philip and Mary, intituled an act for the keeping of milch kine and for breeding and rearing calves ; and also an act made in the fifth year of Queen Elizabeth, intituled an act touching badgers of corn, and droves of cattle

to be licensed; and also an act made in the fifteenth year of King Charles the Second, intituled an act to prevent the selling of live fat cattle by butchers; and so much of an act made in the fifth year of Queen Anne, intituled an act for continuing the laws therein mentioned relating to the poor and to the buying and selling of cattle in Smithfield, and for suppressing of piracy, as relates to butchers selling cattle alive or dead within the cities of London and Westminster, or within ten miles thereof; and all the acts made for better enforcement of the same, being detrimental to the supply of the laboring and mauufacturing poor of this kingdom, shall be and the same are hereby declared to be repealed.

II. And be it further enacted by the authority aforesaid, that all informations, indictments, suits or prosecutions, already commenced, for the inflicting any punishment, or for the recovery of any fine, penalty, or forfeiture, under the said former acts, or any of them, shall cease and determine; and no further proceedings shall be had thereupon; and that no information, indictment, suit or prosecution, shall be commeneed or prosecuted against any person or persons whatsoever, under or by virtue of the said acts or any of them; but that all such proceedings shall be void, and of no effect; any law, statute or usage, to the contrary notwithstanding.

Statutes at Large, 7 and 8 Vict. (Vol. 84), Cap. XXIV.

AN ACT for abolishing the offences of forestalling, regrating and engrossing, and for repealing certain Statutes passed in restraint of Trade.

(4th July, 1844.)

"Whereas, divers Statutes have been from Time to "Time, made in the Parliaments of England, Scotland, "Great Britain and Ireland, respectively prohibiting "certain Dealings in wares, victuals, merchandize, and "various commodities by the names of badgering, fore-"stalling, regrating and engrossing, and subjecting to "divers Punishments, Penalties, and Forfeitures, Per-"sons so dealing; and, whereas, it is expedient that "such Statutes, as well as certain other Statutes made "in hindrance and in restraint of Trade, be repealed, "and, whereas, the Act of the Parliament of Great "Britain, was passed in the Twelfth year of the "Reign of King George the Third, intituled An Act "for repealing several laws there-mentioned against "Badgers, Engrossers, in Forestallers, and Regraters, "and for indemnifying Persons against Prosecutions "for offences committed against the said Acts, where-"by, after reciting that it had been found by expe-"rience that the Restraint laid by several Statutes "upon the dealing in Corn, Meal, Flour, Cattle, and "sundry other Sorts of Victuals, by preventing a free "Trade in the said Commodities, have a Tendency to "discourage the Growth and to enhance the Price of "the same, which Statutes, if put in execution, "would bring great Distress upon the Inhabitants of "many parts of this Kingdom, and in particular upon "those of the Cities of London and Westminster, "sundry Acts therein mentioned and all the Acts "made for the better Enforcement of the same, were "repealed, as being detrimental to the Supply of the "labouring and manufacturing Poor of this Kingdom.

" And, whereas, notwithstanding the making of the " first-recited Acts, Persons are still liable to be prose- " cuted for badgering, engrossing, forestalling, and re- " grating, as being offences at Common Law, and also " forbidden by divers Statutes made before the earli- " est of the Statutes thereby repealed." For Remedy thereof, and for the Extension of the same Remedy to Scotland and to Ireland, be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That after the passing of this Act, the several Offences of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and that no Information, Indictment, Suit or Prosecution shall lie either at Common Law or by virtue of any Statute, or be commenced or prosecuted against any Person for or by reason of any of the said offences or supposed offences.

II. And be it enacted, That the several Acts and Parts of Acts made in the Parliaments of England and Scotland, Great Britain and Ireland hereinafter mentioned, shall be repealed, but not so as to revive any Act repealed by any of the Acts hereby repealed; (that is to say)

The following Acts and Parts of Acts of the Parliament of England, to wit:—

So much of an Act passed in the Fifty-first year of the Reign of King Henry the Third, intituled a Statute of the Pillory and Tumbrel, and of the Assize of Bread and Ale, as is now in force;

So much of an Act passed in the Twelfth Year of the Reign of King Edward the Second, intituled, No officer of a City or Borough shall sell Wine or Victual during his office, as is now in force;

So much of an Act passed in the Reign of King Henry the Third, King Edward the First, or King

Edward the Second, intituled The Punishment of a Butcher selling unwholesome Flesh, as provides punishment for a Butcher or Cook that buyeth Flesh of Jews, and selleth the same unto Christians;

The whole of an Act passed in one of the three last-mentioned reigns, intituled, No forestaller shall be suffered to dwell in any town;

The whole of an Act passed in the Twenty-third year of the Reign of King Edward the Third, intituled, Victuals shall be sold at reasonable prices;

The whole of an Act passed in the Twenty-fifth year of the same Reign, intituled The penalty of him that doth forestall Wares, Merchandise or Victual;

So much of an Act passed in the Twenty-seventh year of the same Reign, intituled, A Statute of Provisors as provides that Commission shall be granted to inquire of offenders contrary to the Statute of 23 Edw. 3, C. 6, and as enacts "The Penalty of forestalling "of Merchandizes before they come to the Staple;"

The whole of two Acts passed in the Twenty-first Year of the same Reign, respectively intituled The Statute of Herrings, and another Statute of Fish;

The whole of an Act passed in the Thirty-fifth Year of the same Reign, intituled An Ordinance of Herring;

So much of an Act passed in the Thirty-seventh year of the same reign, intituled Merchants shall not ingross Merchandizes to inhance the Prices of them, nor use but one sort of merchandize, as is now in force;

The whole of an Act passed in the same Year, intituled Clothiers shall make cloths sufficient for the foresaid Prices, so that this Statute for default of such cloths be in no wise infringed;

The whole of an Act passed in the Second Year of the Reign of King Richard the Second, intituled A confirmation of the Statute of 25 Edw. 3, St. 4, c. 3, against forestallers;

So much of an Act passed in the Thirteenth Year of

the same Reign, intituled The Rates of Labourers Wages shall be assessed and proclaimed by the Justices of the Peace and they shall assess the Gains of Victuallers; who shall make Home Bread, and the Weight and Price thereof, as is now in force.

So much of an Act passed in the Fourth Year of the Reign of King Henry the Fourth, intituled An Hostler shall not make horse bread; how much he may take for oats, as is now in force;

So much of an Act passed in the Twenty-fifth Year of the Reign of King Henry the Eighth, intituled, Proclamations for the Prices of Victuals, viz.: the pricing of them and proclaiming the prices; as is now in force;

So much of an Act passed in the Twenty-eighth Year of the same Reign, intituled, For prices of Wines, as is now in force, not relating to the gauging and measuring of Wine, Oils, Honey, or any other Liquors or Things;

So much of two Acts passed in the Session of Parliament holden in the Third and Fourth Years of the reign of King Edward the Sixth, respectively, intituled, an Act for buying and selling of rother Beasts and Cattle, and an Act for the buying and selling Butter and Cheese, as is now in force;

The whole of an Act passed in the Session of Parliament holden in the Fifth and Six Years of the same reign, intituled, an Act against Regraters and Ingrossers of tanned Leather, except the Prohibition of currying or dressing tanned Leather within the City of London and the suburbs thereof, as provided by the last mentioned act;

Also the following Acts of the Parliament of Scotland; to wit:

An Act passed in the Year One thousand five hundred and three, intituled, of Malt Makaris in Burrow Towns;

An Act passed in the Year One thousand five hundred and thirty-five, intituled, Off Forstallaris;

An Act passed in the Year One thousand five hundred and forty, intituled, For eschewing of Derth of Wittalis, Flesche and Fysche:

Also an Act of the same Year, intituled, For Stanching of Derth and Prices of Wyne, Salt and Tymmer:

Also an Act of the same Year, intituled, Anentis Forstallaris;

An Act passed in the Year One thousand five hundred and fifty-five, intituled, Anent the Disposition of Wyne, Salt and Tymmer brocht into the Realme;

An Act passed in the Year One thousand five hundred and seventy-nine, entituled, For Punishment of Regrateris and Forstallaris;

An Act passed in the Year One thousand five hundred and ninety-two, intutled, Aganis Foirstallaris and Regraittaris;

An Act passed in the Year One thousand six hundred and sixty-one, intituled, An Act for erecting of Manufactories:

Also the following Acts and Parts of Acts of the Parliament of Ireland, to wit:

The whole of an Act passed in the Fourth Year of the Reign of King Edward the Fourth, intituled, An Act against Engrossers and Regrators of Corn;

The whole of an Act passed in the Thirty-third Year of the Reign of King Henry the Eighth, intituled, An Act for Grey Merchants, as revived and perpetuated by a subsequent Act passed in the Eleventh Year of the Reign of Queen Elizabeth, intituled, An Act for reviving the Statute against Grey Merchants, the Statute for Servants' Wages, and the Statute Jeofails;

So much of an Act passed in the Second Year of the Reign of Queen Anne, intituled An Act to prohibit Butchers from being Grazers, and to redress several Abuses in buying and selling of Cattle, which Act is perpetuated by another Act made in the Ninth year of the Reign of Queen Anne, as prohibits any Butcher from being a Grazier, or keeping in his Possession

or in trust for him, above Twenty Acres of Land, or from selling any Cattle to any other Butcher in Dublin, or within Five miles thereof, or from keeping at Hay or Feed Oxen or other Cattle for above Ten Days, or from exposing for sale any Oxen or other Cattle within Twenty miles of the Place where bought; and which prohibits any Person from selling or exposing for sale any Cattle or Sheep on the same Day when bought.

So much of an Act passed in the Tenth Year of the Reign of King George the First, intituled an Act for regulating abuses committed in buying and selling Cattle and Sheep in the several markets of this Kingdom, as prohibits Cattle from being bought within six miles of any market:

The whole of an Act passed in the Fifteenth Year of the Reign of King George the Second, intituled An Act to explain and amend a Clause in an Act passed in the Second Year of the Reign of Queen Anne, intituled "An Act to prohibit Butchers from being "Graziers, and to redress several abuses in buying "and selling of Cattle, and in slaughtering and pack-"ing of Beef, Tallow and Hides:"

The whole of an Act passed in the Thirty-first Year of the Reign of King George the Second, intituled an Act to prohibit Salesmen from being Graziers, and to redress several abuses in buying and selling Cattle or Meat:

So much of an Act passed in the Session of Parliament holden in the Thirteenth and Fourteenth Years of the Reign of King George the Third, intituled An Act for paving Streets within the City and County of the City Dublin, as authorizes a Market Jury to seize Provisions or Victuals in the Hands of any Forestaller, Regrater, or Engrosser:

So much of an Act passed in the Twenty-seventh Year of the Reign of King George the Third, intituled An Act for establishing Market Juries in Cities, as authorizes and empowers certain Market Juries to seize

Provisions or Victuals found in the Hands of Forestallers, Regraters, and Engrossers.

III. And be it enacted, That the several Acts and Parts of Acts which were repealed, as to Great Britain, by the first-recited Act of the Twelth Year of the Reign of King George the Third shall be taken, after the passing of this Act, to be repealed as to the United Kingdom of Great Britain and Ireland.

IV. Provided always, and be it enacted, That nothing in this Act contained shall be construed to apply to the Offence of knowingly and fraudulently spreading or conspiring to spread any false Rumour, with Intent to enhance or decry the Price of any Goods or Merchandize, or to the Offence of preventing or endeavoring to prevent by Force or Threats, any Goods, Wares, or Merchandize being brought to any Fair or Market, but that every such Offence may be inquired of, tried, and punished as if this Act had not been made.

V. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this Session of Parliament.

7 and 8 Geo. IV.

Cap. XXXIX.

AN ACT to repeal such Parts of Two Acts of King William and Queen Mary and of King George the Second, as relate to the Settling the Rates of the Carriage of Goods.

[21st June, 1827.]

Whereas, an Act was passed in the Third Year of the Reign of King William and Queen Mary, intituled An Act for the better repairing and amending the Highways, and for Settling the Rates of Carriage of Goods, whereby it was amongst other Things enacted, that the Justices of the Peace of every County and other Place within the Realm of England or Dominion of Wales should have power and authority, and were thereby Enjoined and required at their then next respective Quarter or General Sessions after Easter Day yearly, to assess and rate the Prices of all Land Carriage of Goods whatsoever, to be brought into any place or Places within their respective Limits and Jurisdictions by any common Waggoner or Carrier, and the Rates and Assessments so made to certify to the Several Mayors and other Chief Officers of each respective Market Town within the Limits and Jurisdictions of such Justices of the Peace, to be hung up in some public Place in every Such Market Town, to which all Persons might resort for their Information; and that no such common Waggoner or Carrier should take for Carriage of such Goods and Merchandizes above the Rates and Prices so set, upon pain to forfeit for every such offence the Sum of Five Pounds, to be levied by distress and Sale of his and their Goods, by warrant of any two Justices of the Peace where such Waggoner or Carrier should reside, in manner aforesaid, to the use of the Party grieved: And Whereas another Act was passed in the Twenty-first year of the Reign of King *George* the Second, intituled An Act

to Explain and amend an Act passed in the Fourteenth year of His Majesty's Reign, intituled 'An Act for the Preservation of the Public Roads in that Part of Great Britain called England'; and so much of an Act passed in the Third year of the Reign of King William and Queen Mary, intituled 'An Act for the better repairing and amending the Highways, and for Settling the Rates of the Carriage of Goods', as relates to the Settling the Rates of the Carriage of Goods, whereby, after reciting the hereinbefore recited Act, it was Enacted, that if any Common Waggoner or Carrier should, after the Tenth Day of June, One thousand seven hundred and forty-eight, demand and take any greater Price for the bringing of Goods to the City of London, or to any Place within the Bills of Mortality, than was allowed and Settled by the Justices of the Peace for the county or Place from whence Such Goods were brought for the carrying of Goods from London to the Said County or Place, Every Such Carrier or Waggoner should for every Such Offence forfeit and pay the Sum of Five Pounds to the Use of the Party grieved, to be recovered and levied in the Manner by the Said recited Act directed, or by Distress and Sale of his Goods, by Warrant under the Hands and Seals of any Two Justices of the Peace for the Counties of Middlesex or Surry, or City of London, or City and Liberty of Westminister; and the Clerk of the Peace for Every County and Place should immediately after Easter Session yearly certify to the Lord Mayor of the City of London, and also to the respective Clerks of the Peace for the Counties of Middlesex and Surry and City and Liberty of Westminster, the Rates and Assessments made for the Carriage of Goods, in pursuance of the said Act, in their respective Counties and Places, which Certificate, or an attested Copy thereof, signed by the Officer to whom the same should be so transmitted, should be taken and deemed sufficient Evidence of the Rates

and Price set for the carrying of Goods to any County or Place: And Whereas, the Provisions hereinbefore recited are at present inoperative, and inapplicable to the present Times, and it is Expedient that the same should be repealed;' Be it therefore Enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act the Provisions hereinbefore set forth, and any other Powers or Provisions in the said recited Acts contained, which relate to the Settling the Rates of the Carriage of Goods, shall be and the same are hereby severally declared to be repealed.

Repealed by Statute Law, Act of 1873.

No. 844.

THE KING PRESS, 105 WILLIAM, N. Y.

JAMES H. McKENNEY,

Synopsis of Brf. of Carter v Lehigh for Appellees.

Supreme Court of the United States.

Filed Feb. 21, 1898.

211

UNITED STATES,
Appellant,

vs.

THE JOINT TRAFFIC ASSOCIATION,
et al.

Synopsis of the Brief for the Joint Traffic Association.

The brief prepared by the undersigned for the Joint Traffic Association was designed to be a full argument on the main questions involved. The considerations having a just place in such an argument are so numerous that they could not be thus dealt with without much copiousness of treatment, and this has necessarily protracted the argument to a great length. It has been the endeavor to preserve a just sequence throughout.

It may be convenient for the Court to be informed beforehand by a synopsis what the line of argument is, and what the principal matters are which go to make it up.

First.—The Preliminary Statement: This is mainly designed to set forth what the true question in controversy is, and point out that it was neither raised nor

considered, and consequently was not determined by the recent decision in the case of the United States against the Trans-Missouri Association. That decision took the question to be, whether, assuming that the agreement under discussion in that case did contain a restraint upon trade and commerce, it could be relieved from condemnation under the Anti-Trust Law, by showing that the restraint was a *reasonable* one, whereas the question now made and discussed in this brief, so far as that act is concerned, is whether such agreements as that of the Joint Traffic Association are, in fact, in any sense restraints of trade or commerce.

Second.—The First and Second Points are made upon questions of procedure, and the matter under them is so brief that no preliminary explanation is needed.

Third.—The argument of the main question, whether the agreement is condemned by the Anti-Trust Act, is begun with the Third Point, which is designed simply to show how the *class of contracts* condemned by the act is *defined*. This is necessarily the first step towards ascertaining whether the contract in question falls within the class. This point goes no further than to assert that the class of contracts condemned is defined by a reference to the *actual effect* which they have upon trade or commerce; that is to say, that only such contracts are condemned as have the actual effect of *restraining* trade or commerce.

Fourth.—The Fourth Point deals only, and very briefly, with the meaning of the word *restrain*, pointing out that its invariable meaning when used in the phrase "restraint of trade" is to *diminish*, and therefore to *injure* trade.

Fifth.—The class of contracts which is condemned

by the act, and the meaning of the words which define the class having thus been pointed out, the way is open for a statement of the main general proposition, and this is made by the Fifth Point, and is that the agreement under which the Joint Traffic Association was formed is *not* a contract in restraint of trade or commerce within the meaning of the act of July 2d, 1890.

The bulk of the whole discussion, so far as respects the Anti-Trust Act, is contained under this Fifth Point, and the line of argument pursued is substantially as follows:

(1.) That no restraint is *directly*, or *in terms*, imposed upon trade or commerce; that all the members of the Association will, as the agreement assumes, continue in business, doing the utmost they can, and in competition with each other; that whatever restraint is imposed by it is imposed simply upon a *single feature* of this competition; that, competition and trade not being identical with each other, a restraint upon competition is not *necessarily* a restraint upon trade.

It is admitted, however, that a restraint upon competition *may be* a restraint upon trade; but it is asserted that whether it is so or not, in any particular case, depends upon the nature and effect of the restraint imposed in such case.

(2.) The argument thus reaches one of the main subjects of discussion, namely, what the effects of competition in trade are; when they are good, and when, if ever, they are bad; and how such restraints have been regarded in public economy, law and legislation. This subject is treated at first *generally*, without reference to the particular effects of competition in the business of *railroad transportation*.

(3.) It is then pointed out (page 54) that the particular field of discussion in the case has been, by what precedes, fully disclosed, namely, the effects of restraints upon *competition* as restraining, or not restraining, trade and commerce, and a particular proposition, substantially equivalent to the main one, is stated as follows:

" III. The agreement in question, as a whole, " and, particularly, so much of it as effects com- " petition, is in the highest degree *promotive* of trade and commerce" (page 35).

The discussion on this head pursues the following course:

(*a*) It begins with a statement of " the ori- " gin, development and present condition in " this country of the business of railway trans- " portation," and shows that by the deliberate policy of all our governments, State and National, that business has been, from the first, subjected to the severest *involuntary* competition, and it points out the ruinous results to which such competition leads when it takes place on *rates*, and aims to show that such results can be arrested, or mitigated, only by allowing the competing parties to displace the strife by some form of agreement.

(*b*) This discussion is proceeded with by pointing out what the main requisites of a good railway service are, and how they are affected by railway competition *in rates*. It aims to show that such competition, by making *uniformity in rates* impossible, makes it impossible to secure any of these essential requisites, and that they can be secured only by some form of concerted agreement between the parties.

(4.) The subject of agreements between railway companies and co-operative traffic associations being thus reached, a sketch is made of their origin and development down to the time of the passage of the Interstate Commerce Law, and it is shown that the most efficacious form of agreement down to that time had been found to be that of *pooling*.

(5.) The Interstate Commerce Law and its effects are then discussed, and it is shown that one of its main objects was to bring about, so far as Federal legislation could accomplish it, *uniformity in rates*, and thus put an end to the practice of discrimination, and attention is called to the incidental feature of the law which prohibited pooling agreements. It is then shown that the effect of that law was to increase and aggravate the very evils which it was designed to remove. Pooling being prohibited, the most effective method for securing uniformity in rates could no longer be employed, and ruinous competition, with every form of discrimination, followed, and to these evils was added the unendurable aggravation that the practices which the law could not prevent were, nevertheless, converted into crimes.

(6.) It is then shown that the necessity was universally felt for some form of concerted action which would put an end to these deplorable conditions and that the present agreement was the result of an earnest effort in this direction.

(7.) An analysis of the agreement is then made, and it is pointed out that it is not aimed against competition *in general*, but assumes that such competition will still continue actively and earnestly on every point except that of *rates*.

Its precise effect upon competition in *rates* is dealt with, and it is shown that while its object is to secure uniformity in rates by inducing competing companies to consent to such uniformity, it does not purport to require it or compel it. That it does not really, or in any proper sense, seek to restrain competition at all, but aims to render competition *open*, *honest* and *lawful*, so that the business of railway transportation may be conducted in conformity with the requirements of the Interstate Commerce Law, and without the daily commission of crime. It shows that, to this end, it is necessary that each railroad company should first establish its rates and should adhere to them for a reasonable period, which is fixed at thirty days, in order if it intends a change that it may give reasonable notice of its intention in time to enable the competing parties to meet it, and to shape their own conduct accordingly; that this is absolutely the only restraint upon competition effected by the agreement, and being only slight and temporary, and necessary in order to enable competition to be open and lawful, cannot be regarded as a restraint upon trade.

It admits that one of its main objects is to secure what the Interstate Commerce Law sought to secure, uniformity in *rates*, but its method of effecting that result is, not by a compulsory agreement, but by taking away the motives to ruinous, secret and unlawful competition in rates. It also points out the many other beneficial provisions of the agreement by which it is sought to make the railroad transportation of the country regular, orderly, safe and effective.

(8). It further seeks to emphasize the beneficial purposes of the agreement by showing that every great industry in which the co-operation of many

different proprietors and agencies is required, necessarily calls for a system of regulation which must be supplied either by the action of government, or, in the absence of such action, by the voluntary action of those who are engaged in it, and it pronounces the association as "*an institu-* "*tion for the regulation of transportation business* "*in those respects in which the State, either from* "*lack of jurisdiction, or because it deems that the* "*regulation could be best devised and administered* "*by the railroad systems themselves, has chosen* "*not to regulate it.*"

(9). Throughout this part of the argument the central proposition is that of the absolute necessity for *some* agency by which *uniformity in rates* may be brought about, and a uniformity not only in the case of merchandise shipped from the same point to the same terminus, but also in the case of merchandise shipped from, or to, any points in any way competing. So long as competition in *rates* exists different men and different places will necessarily be put up, or pulled down, enriched or ruined, as one railroad company may think it to be for its interest to make lower rates than another, and without regard to comparative skill, industry, or other natural advantages which furnish the true and only field for useful competition.

Railway transportation is a public function, and absolute *neutrality* in relation to the multitudinous competitions of life is an essential condition of its just discharge. This neutrality can be secured only by uniformity *in rates*. If this is not secured by government it must be brought about by some private agency. It cannot be secured by governmental action, because the government has committed the business to private hands. The Interstate Commerce Law had this

uniformity for its prime object; and went to the limit of Congressional power in the effort to accomplish it. The prime object of the present agreement is to supplement the effort, not by compulsorily restricting competition, but by taking away the *motives* to it.

It is asked whether it is possible to regard an organization formed to effect an object which the law and public policy unite in viewing as essential, but which Congress cannot by law reach, as a restraint upon trade? It is believed that when this single subject is considered in all its various relations, it is, of itself alone, decisive of the whole controversy.

(10.) The important matter of the classification of freight is taken up and considered, and it is shown that the great end of uniformity in rates cannot be attained without a system of classification; that classification is only a part, although a necessary part, of *rate making;* that its only object and purpose is to make uniformity in rates possible; that it has never been attempted, except as part of an effort to bring about such uniformity, and can never be perfected, or even preserved, except upon the condition of such uniformity.

(11.) The *general usefulness* of the organization formed by the Association is dwelt upon by calling attention to the multitude and variety of subjects upon which it is daily engaged, and especially to its constant occupation with the question, how any particular rates which may happen to have been established, or which may be proposed to be established, affect different places and different merchants or manufacturers engaged in the same business, and who are in competition

with each other, whether they may be a few miles or hundreds of miles apart. It is asserted that the Association becomes the practical arbitrator in cases where the Interstate Commerce Law cannot operate between competing merchants and manufacturers, and between competing places, as to what rates even-handed justice to all requires; that from the nature of the case and the interest of the railroads themselves, no rules can be adopted for decision of such questions except those of justice and equality, and that it is practically impossible that it should be made a medium of monopoly, or for the exaction of anything more than reasonable charges; and that this is proved by a reference to the course of railroad charges during the whole period, embracing many years, in which such agreements have existed, the fact being that they have continually declined from the rate of about three cents a ton or mile to less than one cent a ton or mile, a rate lower than that of railway transportation in any other quarter of the world.

(12.) The argument then, under general subdivision IV (page 105), refers to the matters of fact which were involved or assumed in the foregoing discussion, and justifies whatever assumptions have been made in the following ways:

(*a.*) That, by the very nature of the case, they are matters which must necessarily be true, because they are the results of the operation of the familiar and well-known laws relating to industrial pursuits.

(*b*) Because they have that *notoriety* which requires a court to take judicial notice of them.

(*c*) Because they are fully established by averements in the answer admitted by the appellant in setting down the cause for hearing upon bill and answer.

(*d*) By the declarations repeated in multiplied forms, of the Interstate Commerce Commission, the great public agency which has such supervision and control over the business of railway transportation as Congress can assert. Copious extracts from these declarations are set forth.

(13.) These extracts and other proofs thus referred to are again declared to stamp this Association as one instance, of which industrial life furnishes a multitude, where industrial interests of great magnitude are subjected to private *regulation*, and for the reason that the State recognizes, and always has recognized, the fact that such regulation is far more effective over a large range of subjects than any which the State itself could devise and enforce. This statement is confirmed and illustrated by reference to many different instances.

(*a*) To the multitudinous associations among workmen and employees of various descriptions, all based upon agreements far more in restraint of competition than any contained in this instrument.

(*b*) Similar unions among the employers of labor.

(*c*) To the numerous Commercial, Stock and Produce Exchanges and Boards of Trade, all

of which prescribe rates of commission and for compensation for various services, and forbid any departure from them, and are far more restrictive of competition than any provision in the agreement in question.

(14.) The question is submitted whether trade is in any way restrained by the agreements between laborers and employees, or those between the employers of labor, and it is answered by saying that the final and general results, notwithstanding occasional abuses, are greatly to increase the efficiency of labor and the amount of work done, and to elevate the character of the laboring classes.

The same question is asked in respect to Commercial Exchanges and Boards of Trade, whether they restrain the business with which they are conducted, whether there is less buying or selling of goods in consequence of commissions or other charges being fixed at particular sums. It is answered by saying that, as every one knows, these are all agencies by which the number and magnitude of business transactions is enormously increased.

The same question is put in relation to the operation of the present agreement, or of any agreement tending to secure uniformity in railroad rates and the stability, certainty and safety of railway transportation ; and it is asked whether, in consequence of such agreements, the business of railway transportation or the exchange of commodities is in any particular diminished, and whether it is not, on the contrary, prodigiously extended and enlarged.

(15.) Under general sub-division V (p. 141), the conclusion to which the foregoing line of

argument leads is drawn in these words: "*That "the agreement which this action seeks to condemn "is not by reason of any restraint effected by it "upon competition, or otherwise, a contract in re- "straint of trade or commerce, but is on the con- "trary highly needful to, and promotive of, both.*"

Its necessity to beneficial purposes, as thus established, is then separately pointed out by way of summing up:

(*a*) Its necessity to *stability in rates*

(*b*) Its necessity to *uniformity in rates* and to prevent *unjust discrimination.*

(*c*) Its necessity to secure the general benefits of harmonious co-operation in *classification* and interchange of traffic.

(*d*) Its necessity as a supplement to the Interstate Commerce Act, and in order to make the objects of that act attainable.

(*e*) Its necessity for the *prevention of crime*, for its *punishment* when committed, and for the *prevention of perjury*, committed in order to conceal crime.

(17.) Before leaving the discussion, its results, which are believed to have been established, are made the basis, under the sixth point (p. 151) of an independent proposition, the truth of which it is believed must be accepted. That proposition is as follows:

If the Anti-Trust Act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow:

(1.) That all railroad transportation be abandoned; or

(2.) The consolidation of all competing railroads under a single ownership, either governmental or private; or

(3.) That all competing railroad business must be carried on in constant and daily violation of criminal law.

It is then shown that, inasmuch as neither of the first two of these alternatives is admissible, the third will necessarily follow, and the considerations which make this necessity apparent are again pointed out.

It is then asked with much confidence whether an agreement *necessary* to the prevention of daily violations of criminal law can be regarded as in restraint of trade.

(18.) Under this head an authoritative and very recent decision of this Court is invoked, that of Trinity Church against the United States (143 U. S., 457). The Court in that case declared that if in the interpretation of criminal law a certain act is, by the letter of the law, included within a *class* made criminal, and it yet satisfactorily appears that Congress could not have intended to make such an act criminal, it would be held to be not included within the condemnation; and the decision was fortified by a conclusive array of authorities. It is pointed out that the respondents in this case do not call upon the Court to take such, or indeed any, liberty whatever with the *letter* of any law. In the case referred to the question was not what acts were declared to be crimes by the letter of the law, but whether a particular act confessedly

within the class of crimes could be taken out of it. In our case the question is what the letter of the law *includes*. It is then pointed out that the decision of the Court in the Trans-Missouri case employed the same reasoning as in the case before referred to. It assumed, or regarded it as conceded, that the agreement there in question fell, by the letter of the law, within the condemnation, and the question was whether there was sufficient grounds for taking it out. The Court declared that strong reasons were shown for taking it out, but that they were not strong enough, inasmuch as it appeared that different opinions were entertained as to the policy and propriety of such agreements. The *burden* is *now* on the government to show that our agreement is *within* the letter of the condemnation and that burden cannot be supported by simply showing, if it could be shown, that in the opinion of some persons such agreements are against public policy. It must be shown that the agreement *is within* the letter of the law, which can be done only by showing that its effect upon trade is to restrain, diminish and injure it.

(19.) The seventh point (p. 158) is devoted to a discussion of the *authorities*, and a suggested distinction between agreements restraining competition between persons or corporations engaged in business of a *public* nature and those engaged in *private* business, is fully discussed.

The result reached from this discussion of authorities is that if there could be said to be any authority holding such an agreement as ours to be in restraint of trade, or otherwise injurious to trade or commerce, the overwhelming weight of intelligent authority requires the contrary conclusion.

(20.) The eighth point is a denial that the agreement in any sense constitutes a *monopoly* or a *combination* or a *conspiracy* to *monopolize*.

Under this head it is shown, what must be seen at a glance, that it presents no feature of a monopoly; that no one of the parties to the agreement covenants not to do business, or to restrict its business; but, on the contrary, that the agreement assumes that every party will continue to strive its utmost to obtain all the business it can. The agreement diminishes in no particular the motives to activity of any party or lessens the interest of any party in acquiring business.

Nor does it in any manner, directly or indirectly, seek to prevent or have any effect in preventing other parties from engaging in the same business.

Sixth.—The ninth and last point (p. 190) is devoted to a denial that the agreement is in any manner or sense violative of the prohibition by the Interstate Commerce Act of pooling agreements.

The line of argument upon this point is so simple and direct as to require no synopsis.

JAMES C. CARTER,
LEWIS CASS LEDYARD,
Of Counsel for the Joint Traffic Association.

No. 344. 84.
Sup. Ct. Br. of Carter & Ledyard for Appellees.

THE KING PRESS, 108 WILLIAM ST. N. Y.

FEB 25 1898
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

Filed Feb. 25, 1898.

THE UNITED STATES,

Appellant,

vs.

THE JOINT TRAFFIC ASSOCIATION

ET AL.

344.

Some Propositions Embracing Part of the Main Brief of the Appellees.

The brief of the Joint Traffic Association is designed to present a full consideration of the questions respecting the effect of competition upon trade and commerce, and to show when, and how far, such competition is useful, and should be encouraged, and when mischievous, and should be repressed.

The question of competition in *railway* transportation is treated of as *part* of the general question.

Further study and reflection, however, has satisfied the undersigned that the question of competition in railroad *rates* is a question by *itself*, turning upon considerations wholly peculiar to it, and unaffected by those arguments which bear upon the general question of restraints upon trade.

If this be so, the main question in this cause may be presented and argued by a very few propositions, confined within a very narrow range. A statement of these is herein made.

If they are in any respect novel, it is for the reason that the sharp question of the legitimacy of permanent competition in railway *rates* has never, heretofore, been so made in this country as to challenge thorough investigation.

It will be observed that the propositions relate only to competition in *rates*, and not at all to competition in railway *construction*, or in the *character of the service*.

First Point.—Railways are public highways, to furnish which is one of the chief purposes for which governments are instituted; and were there no other way of furnishing such facilities, it would be the duty of government to establish and operate them. In other words, the furnishing of railway transportation is a *governmental function*.

1. The above proposition will probably not be disputed. It seems almost self-evident. All mere theorists agree to it.

2. The very circumstance that such transportation requires a governmental *franchise* proves it. It requires, indeed, two such franchises, (1) the taking of private property; (2) the taking of tolls.

3. The proposition has been distinctly affirmed in this Court.

Second Point.—If government had retained to itself the actual exercise of this function, the charges imposed by it for performing the service would necessarily, be *uniform*. Any departure whatever from uniformity would be not simply a mistake, but an atrocious wrong.

1. To permit one man to have access to, or from,

the market for his products, or supplies, on better terms than those exacted from another (which is the very meaning of competition in *rates*), would involve the enrichment of one citizen and the impoverishment of another, by the direct action of the government common to both.

2. The Interstate Commerce Law itself affirms this necessity of uniform rates. Its principal provisions require the publication of rates, and make the charge of greater, or *less*, rates than those published a crime.

Third Point.—Governments generally entrust, and and our governments have universally entrusted, the discharge of this function to private individuals or corporations; but this does not affect the necessary requisites of a beneficial discharge of the function. Those requisites *are attached to to the function itself*, and do not depend upon the personality by which it is discharged.

1. If, under a private operation of railways, one citizen is allowed to have an advantage over another, not arising from difference of circumstances and situation, the inequality is still an injustice with which the government is properly chargeable. If this inequality were a necessary consequence of entrusting the function to private agencies, such a delegation should never have been made, and should be recalled.

Fourth.—The policy which has entrusted the discharge of this function to private agencies has indeed permitted the *possibility* of a departure from uniformity in rates. These private agencies will necessarily embrace many distinct ownerships, and such ownerships may engage in a competition

in rates. Such departure, however, will be but occasional and temporary. Uniformity in rates is not only a requisite of railway transportation, but also one of its *natural laws* which will enforce itself.

1. The destruction of uniformity in rates brought about by competing ownerships will, unless arrested by agreement among the rivals, speedily result in the extinction of every rival except the most powerful, and uniformity is thus vindicated and restored.

2. This, however, would rarely, if ever, take place. No rivals will make the sacrifice which would thus be necessary, so long as they could save themselves from the inevitable consequences of protracted war by a treaty of peace.

3. The rivals who are able to agree (and this of course includes those only who are able to keep agreements) will agree. They must be included in any treaty of peace, for they are able to fight. If there are any so weak that their necessities compel them to violate their agreements, they are not *sui potentes*, and ought not to exist; in other words they are operating roads for the support of which there is not sufficient business.

4. The foregoing assertion that uniformity of rates under private ownership will enforce itself may be said to rest upon *a priori* reasoning; this is no objection to it if it be so. But the universal *fact* fully vindicates it. Ownerships, the world over, generally *are* private, but uniformity in rates *secured by agreement* is the general rule. Even in this country, where the conditions are peculiar (by reason of the uni-

versal permission to construct roads and the numerous consequent weak enterprises), the *rule* is uniformity. This uniformity is indeed too often broken up, either by fraudulent and concealed breaches of agreement, or by open war. These will become less and less as the systems become strengthened and solidified, but, as it is, uniformity is the *rule*, and difference the *exception*.

Fifth Point.—Any suggestion, therefore, that an agreement between *competing* railroads for the purpose of bringing about uniformity in rates is a *restraint upon trade*, is, therefore, erroneous on its face. Uniformity, producible only by agreement, is the necessary condition for the prosperity of all trade.

Sixth Point.—There is one condition under which, if government itself performed the function, a slight departure from uniformity in rates might be tolerated, and even be expedient. It would be where it was expedient to establish and maintain a line for the support of which there was not sufficient business.

There would be two ways of doing this. (1). By paying the deficiency out of other governmental resources derived from taxation. (2). By diverting to the weak road unrented traffic, or allowing it to carry at a moderately less rate, and thus divert towards it traffic which it would not otherwise receive.

1. But this is not a *real* departure from uniformity. Uniformity does not mean the *same* rates, but rates measured by the *same* rules. Where circumstances are different, a corresponding difference in rates may be indulged.

2. This happens to be the precise resort employed in the Joint Traffic agreement. That agreement follows strictly the natural method.

Seventh Point.—Any suggestions of possible mischief in permitting private owners to agree upon uniform rates would be quite unfounded. They will not do what it is not for their interest to do. Railroads can find prosperity only in the prosperity of the interests they serve. The imposition of any excess in rates can never be practiced without diminishing the volume of transportation to such an extent as to overbalance any increase in profit.

1. It may be objected that the above proposition rests, after all, upon theory upon which it would be unsafe wholly to rely.

   But what does the counter proposition, namely, that there is an *apparent* advantage in the larger rate which may be immediately secured upon the volume of business actually in sight, and that this will be seized, rest upon? Upon theory, also, and upon theory alone. Let, then, the question be determined by an appeal to the actual fact. The history of railroad transportation in this country and in Europe is an open book, and where can a single instance be found in it, of magnitude worth mentioning, where *competing* railroad companies have engaged in any agreement or combination whatever, express or implied, for the purpose of, or which resulted in, the exaction of excessive charges?

Eighth Point.—If any competing railroad owners should be so shortsighted as to attempt any such abuse, it could be easily discovered and repressed. If the Anti-Trust Act applies to rail-

roads, that act would be perfectly effective for the purpose.

1. The doctrine that agreements similar in form may have been made for different purposes, or may be used for different purposes and be lawful or unlawful, according to the purpose for which made or used, is familiar in the law.

   Assignments and agreements alleged to be in fraud of creditors are of this character. In a multitude of instances their validity depends upon the *purpose* for which they were entered into; and this purpose is to be ascertained by an inquiry into their framework, their necessary effect, and the circumstances under which they were made.

2. It might be suggested as possible that an agreement between competing railways made only for the purpose of securing uniformity in rates, might subsequently be made the agency for raising rates to an excessive point.

   The statute would be amply sufficient to punish any such attempt. This would be a plain combination or conspiracy such as is condemned by the statute and made subject to the like penalty. And thus all cases would be covered. If any agreement should be originally made for an unlawful purpose it would be itself punishable as an agreement. If innocent at first, but made subsequently a means of accomplishing an unlawful object, the subsequent attempt to accomplish the unlawful object by the parties to the agreement would, of course, be a prohibited combination or conspiracy.

JAMES C. CARTER,
LEWIS CASS LEDYARD,
Of Counsel for Joint Traffic Association.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,

vs.

THE JOINT TRAFFIC ASSOCIATION AND OTHERS,
Appellees.

No. 341.

Observations on the Subsequent Argument Submitted by the Solicitor-General Under the Leave Granted Him by the Court.

The learned Solicitor-General has made large use of the opportunity afforded him, and has sought, to a very considerable extent, to construct an argument not made by him upon the oral hearing.

No objection is taken to this by the undersigned; indeed, it is rather welcome, for it sufficiently appeared on the argument that the learned Solicitor General had not entirely anticipated the views upon which the decree appealed from would be supported by the appellees, and was for this reason less prepared to answer them.

Further opportunity having now been afforded to him, the counsel for the appellees have the better

reason for thinking that they have been put in possession, by this further argument of the learned Solicitor General, of all that can be urged in opposition to their own argument.

The undersigned now desire to point out the particulars in which, as it seems to them, this last argument of the Government is a wholly insufficient answer to the propositions upon which the agreement was supported upon the oral argument.

First.—Under his Second head, the learned Solicitor General insists that the argument of Mr. Carter was directed to a discussion *anew* of the questions considered and determined in the Trans-Missouri case; but he makes no attempt to put a different construction upon the opinion of the Court in that case from the one imputed to it by Mr. Carter. The decisions of the Courts, and especially of this Court, are regarded as authority only for what they *consciously* determine; and they consciously determine only those questions which are considered as made and submitted for decision.

There are two questions which might be presented upon agreements of the general character of these railroad agreements:

> 1. Assuming them to embrace a restraint upon trade, but a reasonable restraint only, are they condemned by the statute? In other words, does the statute condemn absolutely every agreement in any way restraining trade, or such only as are unreasonable?
>
> 2. Is the particular agreement in question in restraint of trade at all; that is to say, does it, in terms, *come within the class* of contracts condemned by the statute? No one can say that these two questions are not broadly distinct.
>
> The statement on behalf of the appellees that it was the second question only which the Court

considered and determined in the Trans-Missouri case was founded upon numerous passages in the decision itself, all of which were fully cited.

It was these passages which the learned Solicitor-General should have considered, and he should have shown, if he could show, that they did not import, and indeed, directly declare, that it was the second question alone which was considered and decided.

Second.—Under his Third head, the learned Solicitor-General holds that an agreement may be in restraint of trade without diminishing, reducing or injuring it ; that the public may be injured by an agreement which in fact promotes and increases trade; and he suggests that a monopoly may furnish the community with a product at a less price than it will otherwise be furnished at, and yet be against public policy and a violation of this statute. These views seem very extraordinary. The learned Solicitor-General seems to be of the opinion that any great aggregation of capital, whether owned by a single individual, or by a partnership, or by a corporation, may conduct the business of production on so large a scale and with such consequent economies as to furnish a commodity in much greater abundance and at less cost, and thus bring it within the reach of a much larger number of people, and still be a *monopoly*. This seems very incorrect. The essential element of a monopoly is that one man, or a set of men, have a control over a particular thing, other than that derived from the possession of mere wealth, which enables them to impose, free from competition, the terms upon which others may obtain it. The mode in which public injury is supposed to arise in such a case, is that greater prices are in fact exacted, and, consequently, the trade in the commodity reduced and injured.

If there can be, however, an agreement which does

not reduce, diminish or injure trade, but which yet creates a monopoly and is illegal at common law, or under the statute, for that reason, and the present agreement is of that character, it must be attacked as being a monopoly, and not as being in restraint of trade. It would have been in order, therefore, for the learned Solicitor-General to point out in what respects the agreement in question created, or tended to create, or was ever designed to create, a monopoly. Such a charge would have no foundation whatever. To assert that where everybody is at liberty to build a railroad if they like, an agreement between railroad companies seeking to bring about uniformity of rates, which contains no power whatever to dictate an unreasonable rate, or any other unlawful action, and which does not even attempt to restrict competition, except, at the utmost, for the short period of thirty days, in order to compel competition, when resorted to, to be open and lawful, and which leaves the parties to it in full competition upon all other points except rates, each one being dependent for the amount of its receipts upon its success in attracting traffic from its rivals, seems too obviously unreasonable for serious refutation.

Third.—Under his Third and Fourth heads the learned Solicitor-General embraces a series of observations without any distinct proposition, and therefore leaves nothing to be answered. The tendency, however, of these observations is apparently to the effect that the policy of the law has erected competition in all the pursuits of life into a *supreme good*, and that anything which in any way, or in any degree, tends to restrict it, or supplant it, is mischievous and against the policy of the law. It seems to the undersigned that it would be scarcely possible to make a statement more erroneous that this, the truth being that competition, like the desires or passions of man's nature, is capable both of good and of evil

effects; that so far as respects the former, it is to be encouraged, and as to the latter, restrained, the faculty of reason being bestowed upon man very largely for this purpose.

But who will say, after reflection, that competition in railroad *rates* is an unmixed good, or indeed anything but evil? If there is any meritorious quality which the service of railroad transportation ought to exhibit and which competition in *rates* does not tend to destroy, the undersigned cannot perceive it.

But those who have apprehensions that powerful corporations, or individuals possessing the power which great wealth furnishes, are able to secure enormous and unjust advantages by securing for themselves lower rates of transportation than their weaker rivals, must certainly perceive that there is little except evil which can proceed from competition in railroad rates, and nothing but good from an agreement fairly designed to secure uniformity in rates. Competition in rates is the very field in which great industrial corporations, or other great aggregations of capital engaged in industrial pursuits, have their most advantageous play. They are able to supply the greatest inducements for furnishing, and possess the greatest power in exacting the lowest rates. The superior power of large wealth furnishes many advantages of which no just complaint can be made. The man who, with a large capital, manufactures on a large scale, can procure his materials, his supplies, his labor and his skill on better terms than his weaker rivals; but that he should secure the transportation to, or from, a market of his materials, or his products, upon better terms than others are able to obtain, is a gross injustice which should not be permitted. This injustice is not possible where uniformity in railroard rates is secured, and to bring this about is one of the main purposes of the agreement in question. The object is to fortify and strengthen every member of the association against any temptation or influence proceeding

from powerful shippers to secure for themselves lower rates than are accorded to others.

Fourth.—Under his Fifth head the Solicitor-General makes a show of answering the argument of the appellees, founded upon the ruinous and mischievous effects upon the railroads themselves of competition in railroad rates; but, instead of answering, he really avoids an answer. He points out that competition has like ruinous effects in the other industrial pursuits, and would have it inferred that there is no difference in the cases; but the argument to which he affected to reply insisted upon the broadest differences. It pointed out that competition in ordinary pursuits was *voluntary*, but that in railroad rates, unless it were open to companies to make efforts towards uniformity, competition was *involuntary*, and, unless arrested by some sort of agreement which, according to the pretensions of the appellant, could not be done, would necessarily result in the ruin of all the rivals save the more powerful.

Fifth.—Under his Sixth head the Solicitor-General attempts to point out how restrictions upon competition in railroad rates operate to restrain trade. His suggestion is that competition tends to make lower rates, which it undoubtedly does immediately and directly, and as long as the competition lasts, that is to say, as long as the weaker rival continues to exist. He argues, therefore, that a restriction upon competition, as it prevents a decline in rates, really keeps them at a higher point than that to which they would otherwise go, and thus makes higher rates, which seems to be a fair conclusion.

But we must state the proposition which is implied by this reasoning, and which alone it supports. That proposition is that *low* railroad rates are, in themselves, a public benefit: and *the lower the better*, and

without reference to the fairness, justice and reasonableness of the rates, so that the best condition would be when the rates were reduced to zero. Why does he not venture to formally lay down this, the only, proposition which his argument seems calculated to support?

In employing this proposition he states no qualification; but if he were asked, "Do you really mean that trade, *in general and as a whole*, would be promoted by a competition in railroad rates which would destroy all uniformity and equality, all stability and convenience, deprive the companies of a profit and make the operation of them an expense, involving their necessary deterioration and unfitness to perform the function with which they are entrusted?" he would probably say "No," that he did not mean that trade would be really benefited by a competition which reduced the rates below what was *reasonable*; and thus his argument would amount simply to this: that the imposition of *excessive* railroad charges was an injury to trade, in which he will find no contradiction from us.

Sixth.—Under his Seventh head he assumes to answer the argument that railroad rates should be *stable*, and his answer is two-fold. First, he says that *absolute* stability is impossible. That may be, but is this any reason why it should not be striven for and as much of it as is possible obtained?

His next answer is that the agreement in question does not secure it. To be sure it does not *require* it; if it did require it by binding each company to permanently accept rates established by some external authority, the charge would be made against the companies that they had permanently restricted competition and conferred upon others the power to compel them to exact even unreasonable rates. The companies in framing this agreement sedulously endeavored to avoid any appearance even of illegality. They

took industrious care not to commit to anybody the power to call upon them to do an illegal thing, and to enjoin upon their agents obedience to law, and also took care to leave the companies free to compete if they chose to do so, subject, however, to a temporary restriction necessary to make that competition open and lawful. If uniformity in rates is beneficial as an *end*, surely a well-intended effort towards it cannot restrain trade.

Seventh.—Under his Eighth, Ninth and Tenth heads he refers to an argument advanced by the appellees, and which is deemed by them of predominating weight, namely, that railroads should not be permitted to take sides in the competitions of their patrons, but should stand neutral between them. This argument was illustrated by instancing the case where a manufacturer in Michigan was enjoying a profitable trade with his market in New York and Philadelphia, and paying a certain charge for the shipment of his product, and where a rival in Indiana, by obtaining a better rate from another road to the same market was enabled to undersell the Michigan manufacturer and drive him out of business, a thing which is possible to an enormous extent all over the country wherever there is competition in railroad rates, and which is supposed, probably with truth, to have been productive of the most prodigious wrong.

His first answer to this argument is that the agreement in question has no tendency to prevent such consequences, because the suggested evil arises only from diversities in *local* rates, whereas the agreement in question applies only to rates on competing routes. But this is an error of the learned counsel. The case supposed is one where both manufacturers, although they may be obliged to avail themselves, for a short distance, of some local line, are yet obliged, for the greater part of the transit, to make use of one, or another, of these great competing trunk lines, and it

is the difference in rates over those competing trunk lines which constitutes the great bulk of the whole difference.

The learned counsel fails, we think, to appreciate an argument greatly relied upon by the appellees—an argument which has never heretofore in discussions upon this subject been sufficiently considered, probably for the reason that it has not been adequately, if at all, presented. That argument is founded upon the circumstance that competition in railroad *rates* wherever it obtains, immediately and necessarily allies itself with all the competitions in other industries, and competing railroads are thus made to take sides in all industrial rivalries, where is they ought always to preserve absolute neutrality between them. The nine great through systems finding their western *termini* at Chicago and other points stated in the agreement, and their eastern in the cities of the Atlantic coast, are fed, on the west, by all the great producing interests which lie to the westward. Every manufacturer or farmer dependent upon any one of these lines for reaching a market is at once made a competitor with every other farmer or manufacturer of similar commodities situated in the same vast region no matter where, and seeking the same market by any one of these lines. Under conditions of railway competition any producer dependent upon one of these lines can secure an advantage over a rival dependent upon another if he can get a better rate, and of course he will omit no effort to obtain it. Correspondingly each railroad can increase the amount of traffic making use of its line if it can, by giving advantages to its patrons, help them to triumph over the competitions of those dependent upon another line. One farmer may thus receive five or ten per cent. more profit upon his crop than another who enjoys no better natural advantages and exhibits no more industry or skill, and one manufacturer enjoying no better natural advantages or exhibiting no more

industry or skill than a rival depending upon another road may yet be enabled to crush him. Under a condition of competition in railroad *rates* it is impossible to prevent these wholly improper alliances. It is a principal and daily business of the Joint Traffic Association, under the agreement under discussion, to deal with the multitude of questions which arise under these conditions. When a manufacturer or producer in one part of the country applies to a transportation agent of one of these competing lines to learn what rates he can have and permanently rely upon, the request is at once transmitted to the main office of the Association. Those who have charge of the business of the Association transmit the request to the officers of all competing lines and ask what objections there may be to the rate asked for. If any of these lines receive support from similar industries they at once call upon their patrons and ask what objections they may have, if any, to the rate. They will, of course, answer that if any change is made it must be made generally on all lines, and on equal terms to all. The answers are transmitted to the central office and the problem is there considered and determined in a way which is just to all the railway interests which are represented, and this, of course, secures equality among all the rival shippers. It is in this way that all the industrial interests find their representatives and protectors in the particular railroad which they rely upon, and these railroads secure an equitable adjustment of the problem through the instrumentality of the Joint Traffic Association.

The argument was also employed on behalf of the appellees that the Inter-state Commerce Act itself had, in the most impressive manner, sanctioned and enforced, to the extent of the power of Congress, this principle of uniformity in rates. The learned Solicitor-General under the same head as above mentioned, denies this, but he supports his denial by a reference to no fact except that the Inter-state Commerce Act

abolished the pooling agreement. And from this he infers that the object of Congress was to preserve competition in rates. It is indeed true that pooling agreements were forbidden. Why this was done we do not clearly know, and probably the better opinion is that the prohibition was an error. There were, however, distinct objections to the practice of pooling which did not attach to other agreements or arrangements designed to bring about uniformity in rates; but if the purpose of Congress was to prohibit any restraints upon competition in rates why did it not say so and declare expressly that all agreements restricting, or designed to restrict, competition in rates should be unlawful? But the provision of the Inter-state Commerce Act relied upon by the appellees, as showing Congressional recognition of the importance of uniformity in rates, was that which required all railroads to *publish* their rates, and then prohibited them from charging any greater, or any *less*, rates than those published. This could have been intended for no other than the just purpose of compelling those who exercise the public function of railroad transportation to stand neutral between business rivals. But is it of any greater importance that neutrality on the part of one railroad between its own patrons should be secured, than that a similar neutrality should be preserved by all competing railways upon one or the other of which rival manufacturers, or producers, depend? That a particular railroad company should afford to one of its patrons rates lower than it grants to a rival is at once perceived to be an indefensible wrong. Is it any less a wrong, or less defensible, that one rival in Indiana, dependent upon a particular line to New York, should be able to secure the transportation of his product to market on terms which would enable him to crush a rival situated in Michigan, because that rival depending, not upon the same line, but one parallel and competing with it, was not able to obtain similar rates?

Of course, in saying the *same* rates we do not mean literally, the same rates, notwithstanding differences in the length of the transportation and other natural conditions. Such differences are natural advantages, or disadvantages, which rivals are entitled to enjoy, or compelled to bear. In any scheme of uniformity of rates, such differences are of course taken into account. What is meant by a *lower* rate is a *relatively* lower rate occasioned simply by railroad competition. It may be asked why Congress in the Inter-state Commerce Act did not enact some provision calculated to secure equality between rivals dependent upon different competing lines. The answer is obvious: It could not do so without itself prescribing the rates, and to this there were insuperable obstacles. The constitutional safeguard against the exercise by government of powers of ownership over things it does not own, the inability to prescribe rates for any thing except inter-state commerce, and the utter inability of separating, for such a purpose, inter-state from local traffic, were difficulties which made all consideration of such an effort unnecessary. Congress proceeded as far as it could go, and enacted uniformity to the extent of its power.

The learned counsel under the same heads has asserted that the Inter-state Commerce Act has in effect enacted and secured competition in railroad rates. Nothing is stated in support of this assertion except the circumstance of the abolition of the privilege of pooling, which has been already commented upon. Any assertion that Congress has intended to enact and perpetuate diversity in rates when it was so plainly impressed with the mischiefs arising therefrom, is entirely unfounded.

Eighth.—There is underlying the argument of the learned Solicitor-General all through his discussion, so far as it has been considered, an implied assertion that what the public has a right to in respect of railroads is

such a rate as shall be produced as a result of competition; but this is saying that *reasonable* rates are such as flow from the action of competition; that is to say, that the existing rate is always a reasonable rate, provided it be shown that in respect to any particular business there are competing lines of railroad not bound by any understanding with each other; for if there is an understanding, which is complied with, it is just as effective in repressing competition as the most formal agreement would be; but this is not the language of the law. Common carriers of whatever character are always entitled, and only entitled, to *reasonable* compensation, and that means a reasonable reward for the service which is rendered. This limitation to reasonable compensation arises from the circumstance that the business engaged in is of a public nature. *Railroad* carriers, besides being engaged in the business of a public interest, are actually performing a function of government, and this consideration attaches to them another obligation, not incumbent upon water carriers, or other land carriers, and that is to perform the service *upon equal terms to all*. The assertion of a right on the part of the public to the constant operation between railroads of competition in rates, is to assert that the operation of such competition is a universal good. It were far better described as a universal evil, inconsistent as it is with the existence of any of the fundamental requirements which the performance of this public function ought to exhibit.

Ninth.—Under his Eleventh head the learned Solicitor-General again imputes to Mr. Carter the argument that there should be *absolute* uniformity in railroad rates, a uniformity which would eliminate from consideration all natural advantages or disadvantages. This is an entire misapprehension. Mr. Carter made no such argument. The uniformity contended for by him was the uniformity which respects, preserves and makes allowance for, all natural advantages, a uni-

formity which consists in similar rates under similar circumstances.

Tenth.—Under his Twelfth head the Solicitor-General refers to the legislation of various states prohibiting the consolidation of competing railroads as evidencing a public policy designed to preserve competition in rates. Perhaps there may have been some notion on the part of many legislators, not well informed upon the subject, that competition, even in *rates*, was requisite in order to prevent excessive charges, but this is not the real significance of the legislation referred to. It has a broader and juster foundation. There is a valuable description of railroad competition as well as a mischevious one, and this is competition in *railway construction* and in the *character of the service*. It is impossible in a multitude of instances that one line in one direction should answer all the just public demands. There must be parallel lines, and in some instances many of them. There may be too few for the public wants; this is an evil. There may be too many; and this is another evil. In other countries these questions are dealt with by the legislature, which makes careful inquiry in the case of any proposed new road whether there is a public demand for it. With us the whole matter is left to the results of competition. The assumption is that wherever there is a sufficient business to sustain a road capital will come forward to supply it, and that wherever there is no sufficient demand for one the capital will not be forthcoming. This competitive policy is what is relied upon to furnish enough, and no more than enough, of these public facilities. How well it has answered this purpose may be questioned. There can hardly be a doubt, however, that on the whole there has been an over supply. The other point upon which competition is useful is in the character of the service. It is in a high degree desirable that this should be improved.

It is the natural tendency of every road to improve its facilities, because improvements, as a rule, always bring a sufficient reward through an increase of business. But where parallel lines exist in competition and each road is dependent for the amount of its traffic upon the inducements which it can offer to shippers, the improvement of facilities is vastly stimulated, even though competition in *rates* were superseded by an effective agreement or understanding. It may be said, indeed, that pooling agreements might have some tendency, if there were any assurance of their permanency, to make railroads indifferent to the amount of business they receive, inasmuch as their shares of the whole are fixed. This consideration, however, has but little effect, for all the parties to a pooling agreement know that such agreements are likely to be broken up and they cannot afford to allow any traffic to become, even temporarily diverted, it being the tendency of any diversion to perpetuate itself. Moreover, none are better aware than railroad managers that the entire volume of business is not a fixed quantity, but depends very largely upon the conduct of the railways themselves; the better the facilities which are offered and the more near to the reasonable point the rates are fixed, the larger the aggregate amount of business, and any enlargement of the aggregate amount of course enlarges the shares of the participants, even under a pooling agreement. But any agreement which, like the Joint Traffic agreement, contains no element of pooling, but under which each company receives the entire benefit of all the traffic it obtains, and can increase the amount of its traffic only by offering superior facilities, furnishes the highest competitive stimulus to increase those facilities. It may be said that such increase by the stronger roads might operate to draw traffic from a weak road to such an extent as to call upon the managers for some action, such as is permitted by the agreement, to divert back a part of the traffic thus

taken, in order to enable the weaker road to live. But the active and energetic road cannot be subjected to any advantage on this account. The managers, in forming any notion as to what the equitable share of each competitor in the traffic is, have as their principal guides the actual share which each obtains under a system of uniform rates. To diminish the share of any one because it has succeeded by its diligence in increasing its proportion, would be very far from equitable. It is one of the assumptions of the agreement that all the parties to it have an inherent power to maintain themselves in life by the exercise of reasonable skill and energy. If they fail, by neglect, to make good this assumption, they confess themselves unable to live. No such road has a right to existence and should go into other and better hands, or die a natural death.

Eleventh.—Under the Thirteenth head the learned Solicitor-General seeks to question the distinctions pointed out upon the oral argument on the part of the appellees between the Trans-Missouri agreement and the Joint Traffic agreement. While admitting that so far as any power is given to the managers by the Joint Traffic agreement to fix rates by a recommendation, it is only to fix *reasonable* rates, he asserts that this is true also of the Trans-Missouri agreement. The learned counsel has, in consequence probably of not having the actual agreement in the Trans-Missouri case before him, fallen into an error in this particular. That agreement conferred upon the association an unlimited power to fix rates in the first instance. The authority was not confined to *reasonable* rates. It will be borne in mind that in the case of the Joint Traffic Association the start was made with rates *fixed by each company for itself*, and filed with the Inter-state Commerce Commission, and admitted by the pleadings to be reasonable; and no power was given to the board of managers to make any change in the rates

thus affirmed, or to make any other rule or direction by way of recommendation, except such "as may "be reasonable and just." (Sec. 2.) Moreover, it was declared by Section 3, "The powers conferred "upon the managers shall be so construed and exer- "cised as not to permit violation of the Inter-state "Commerce Act, or any other law applicable to the "premises, or any provision of the charters or laws "applicable to any of the companies parties hereto, "and the managers shall co-operate with the Inter- "state Commerce Commission to secure stability and "uniformity in the rates, fares, charges and rules "established hereunder." Nothing can be clearer than that any attempt on the part of the managers to recommend any unreasonable rate, or to impose any unreasonable or unlawful rule, would be an absolute nullity. It would bind nobody, and each company would be perfectly safe, *under the agreement*, in totally disregarding any such recommendation or rule, and could not be subjected to any fine, punishment or other disadvantage under the agreement. The parties to the Joint Traffic Association were scrupulously careful not to put it in the power of any outside body to require them in any manner to violate any law, or do any unjust or unreasonable thing. On the contrary, the real and declared purpose was to better enable them to conduct their business lawfully and in accordance with the Inter-state Commerce Law and in harmony with the administration of that law.

We do not mean to suggest that there was any *intention* in the case of the Trans-Missouri agreement to violate or evade any law, but it is true that no one of the limitations of power and precautionary provisions above mentioned were contained in it. Without any rates being established by any company itself and filed with the Inter-state Commerce Commission, broad authority was given to the association to establish rates for them without any limitation to

such as were reasonable. The authority was conferred in these words:

> "Sec. 3.—A committee shall be appointed to "establish rates, rules and regulations on the "traffic subject to this agreement, and to con- "sider changes therein, and make rules for the "competition of outside lines. Their conclu- "sions, when unanimous, shall be made effective "when they so order; but if they differ, the "question at issue shall be referred to the man- "agers of the lines parties hereto, and if they "disagree it shall be arbitrated in the manner "provided in Article 7." (As printed in 58 Fed. Rep., 60).

In case any unreasonable rate were in fact fixed, or any unlawful order made, the parties to the Trans-Missouri agreement would still be temporarily bound by it, although they might get rid of it by giving notice of dissent, which would become operative ten days thereafter. How can it be pretended that the two agreements are not most broadly distinguished upon the most material points?

It is true that under the Joint Traffic agreement the companies are bound *temporarily* by a recommendation, and for the period of thirty days, but only by a *valid* recommendation, that is to say, by one *within the power* of the managers to make, and this can only be when it is reasonable and lawful. The reason for this temporary obedience has been fully explained. It lies in the fact that all the members are left *free to compete*, and in order that the competition, if resolved upon, should be *open* and *lawful*, as required by the Inter-state Commerce Act itself, notice of it is necessary for a sufficient length of time to enable the other parties to openly and lawfully change their rates, so as to meet the competition in an open and lawful way.

The Solicitor-General intimates that Mr. Carter's explanation of this provision on the oral argument was that it was designed to give an opportunity to the other members to determine whether they would take steps "to exterminate" the recalcitrant member. Whether Mr. Carter used this particular phrase or not he does not remember, and it is of little importance; no exception is taken to the observation, for if any member should insist upon making ruinous rates, there would be no alternative but to meet them, or to surrender the traffic; in other words, war would be declared, and the result of war, if persisted in, is necessarily the extermination of one of the parties.

Twelfth.—Under his Fourteenth head the learned counsel objects to those provisions of the Joint traffic agreement designed to mitigate the temptations which weak roads are often under to enter upon a mischievous competition, and he intimates that it is wrong to help a weak road by taking from it traffic which would naturally go to a stronger one.

Nothing could be more beneficially contrived than the provisions in this respect of the Joint Traffic agreement. That association recognizes the fact that there is a large number of competing lines all of which have demonstrated their usefulness to the public and their legitimate existence by a long existence in fact. Some of them, however, are under many disadvantages of one description or another which makes competition with their rivals under the *same* rates often difficult. What would Government do if it had constructed and was operating a certain number of parallel lines, the existence of which it deemed necessary for the public interest, and had adopted the policy, which it would necessarily adopt, of uniform rates, and sought to make each line self-supporting, if it found that some one of the lines could not easily sustain the competition with the others owing to disadvantages? It would say "The circumstances are different, and the real

principle of uniformity justifies the carriage by the weak line of traffic at a somewhat less rate, in order to enable it to get more than it would otherwise receive," and would therefore permit such line to carry at a somewhat less rate ; in other words it would allow a *differential*, or appoint soliciting or managing agents, who might use affirmative efforts to obtain shipments without any change of rates, or might divert, to a certain extent, unrouted traffic to the needy line. What possible objection could there be to either of these measures ? They happen to be the very ones sanctioned by this agreement. In the absence of something of this sort the necessary result would be the loss of a useful public facility, useful at all times to local traffic, and at particular times, when there is a pressure of business, to through traffic.

But the question here, as at every step, is, do these provisions restain trade ? Is there less of buying and selling of merchandise, or transportation business, in consequence of them ? The answer must be that they promote trade, for anything that preserves the existence and usefulness of a great public line of transportation is promotive of trade in the highest degree.

Thirteenth.—Under his Fifteenth head the learned Solicitor-General says that the provisions of the Interstate Commerce Law against discrimination and undue preferences may be enforced without suppressing competition ; to which we say, first, as we have said many times, that our agreement does *not* suppress competition ; absolutely not, so far as respects railroad *construction*, or the quality of the *service*, and only in the slightest degree and temporarily, in the case of competition in *rates*. But why does he not tell us how it is possible, under the operation of competition in *rates*, to prevent one line from giving better rates to one set of manufacturers or producers than another competing line gives to another set of rival manufacturers or producers, and show us that such

discrimination is not equally unjust and prejudicial to trade as the discrimination exhibited by one line in favor of some of its patrons and against others? And why does he not say whether, looking to the actual results, shown by experience, of the attempts to enforce the provisions of the Inter-state Commerce Act, so far as they go, in respect to discrimination, those attempts have not been total failures, involving in their train all manner of dishonest and unlawful practices; and whether, if the uniformity in rates aimed at by the present agreement should be brought about in the way it seeks to bring it about, and to the extent that it should be successful in bringing it about, would not, in the most substantial manner, aid in accomplishing the beneficial purposes of the Inter-state Commerce Law? And again we ask whether a *bona fide* agreement, intended to bring about a compliance with the provisions of the Inter-state Commerce Law, and well calculated to secure such compliance, and calling upon the parties to it to do nothing but purely lawful acts, can be regarded as in restraint of trade?

Fourteenth.—Under his Sixteenth head the learned counsel criticizes the suggestion on the part of the appellees that if Congress had intended its restrictions to operate as broadly as is insisted upon by the Government it would have in terms condemned "every contract in *any* restraint of trade." If this were the real suggestion made by counsel for the appellees it was not a very important one. The suggestion intended to be made was that if Congress really intended its prohibition to reach, as the learned counsel maintains, every restraint upon *competition*, why did it not directly prohibit "every agreement in restraint of trade" or *in restraint of competition in business?* Congress has not prohibited restraints upon *competition*, unless they amount to restraints upon trade. The learned counsel will have accomplished something towards the support of this action when he succeeds in

showing what he has not yet attempted, that every restraint upon competition is necessarily a restraint upon trade, or that the particular restraint upon competition contained in this agreement, however slight and apparently useful, is restraint upon trade.

Fifteenth.—Under his Seventeenth head the learned Solicitor-General, as his only answer to the impressive argument of Mr. Phelps on the constitutional question, suggests that the answer is to be found in Mr. Carter's argument pointing out that the construction and operation of railways is a *public function*, from which he seems to think it follows that where Government makes a grant of the franchise it can by law regulate the exercise of it. But if this argument proves anything it proves too much. It would prove that Government might make any regulation which it might in practice adopt, if it retained the franchise in its own hands, and operated the roads. This certainly cannot be contended. Undoubtedly there are *some* regulations which Congress may prescribe, but not *all*, and the question is how far its authority extends. The argument which it was for him to answer was whether, when the Government has granted to another a public franchise, which franchise becomes, by the grant, the *property* of such other, it can prevent the grantee from exercising that ordinary freedom of contract in the use and management of the property which is necessary in order to make the property useful, and in making which the grantee would be protected by the constitutional safeguards in the case of other property.

Sixteenth.—Under his Eighteenth and Nineteenth heads, the learned Solicitor-General makes some observations in reference to remedies against rates unreasonably low and unreasonably high. The pertinency of these observations is not perceived, except so far as respects a suggestion supported by an extract

from the opinion of Mr. Justice Shiras in a case decided in the Circuit Court of the United States for the Northern District of Iowa, that the difficulty of determining what is a reasonable rate should lead to the conclusion that the actual rate *published* by any company and *filed* with the Inter-state Commerce Commission under conditions of free competition, should be taken as the *reasonable* rate, that is to say, that the reasonable rate is always the actual rate which competition has brought about.

This would seem to be a singular conclusion. It proceeds upon the notion that competition in *rates* between railway companies is governed in some respects, or in some degree, by what is *reasonable*, whereas we know to the contrary. Where competition in railway rates is active, the determining consideration is to get the traffic by cutting under the rival, no matter how low he goes. The only question is not what is *reasonable*, but what rate has the rival *in fact given*. Then too, a strong company might determine not to enter upon the competition and might file with the Inter-state Commerce Commission an unreasonably *high* rate, thinking that the profit thus derivable, even on a diminished traffic, had best be accepted rather than engage in a ruinous competition—a determination not likely, indeed, to be reached. Would the shipper under such circumstances be precluded from asserting that the rate was unreasonable? Is *the lowest rate of any competitor* to be regarded as the reasonable one?

If the intended argument be that the difficulty of determining what a reasonable compensation for railroads should be, is so great that it is necessary, or advisable, to abandon the effort and adopt some fixed and arbitrary standard, it cannot be allowed. The making and bringing before courts of questions difficult of determination is the commonest experience in the law; but this does not relieve the tribunals from the necessity of determining them. Whenever justice

requires the determination of a question the determination must be reached. It was once directly declared in a prevailing opinion of this Court, although the question was not necessarily involved, that a legislature could prescribe the rates which a railroad might charge and that its action determined the question of reasonableness. It was soon found that no such doctrine could be adhered to and that any legislation prescribing a destructive rate was invalid. The question of reasonableness of railroad rates was declared to be a *judicial* question and this and other courts have not hesitated to enter upon and determine it, notwithstanding its confessed difficulties. Courts of justice cannot avoid questions on account of their difficulty.

Seventeenth: The foregoing covers the substance of the points made by the learned Solicitor-General in his effort to answer the argument on the part of the appellees. It is, we think, a fair general criticism to make of this effort that it is *desultory*, dealing with *incidents* and *details*, and not attacking *main positions*.

The particular proposition which he was called upon to establish, and the burden of establishing which rests upon the Government, was that this Joint Traffic Agreement is within the class of contracts condemned by the Inter-state Commerce Act, which class is therein clearly defined as contracts "in restraint of trade." The argument designed to show that it was not within this class, and which it was for him to answer, affirmed that the agreement did not restrain trade at all, but was in a high degree promotive of, and indeed necessary to, trade. It embraced these four main positions:

1. It pointed out with detail that the vast business of operating railroads both in conjunction and in competition, constituted a general interest of vital importance to the trade and commerce of the country, which ought to be managed harmoniously and, so far as possible, as a *unity*; that to

this end it needed *organization*, which could be reached only by the establishment and observance of certain rules of uniformity; that Government, either from lack of jurisdiction, or from choice, or from both, had refrained from fully establishing those regulations which would lead to the conduct of the business as a harmonious whole, so as to make it productive of the highest degree of usefulness to the public and to those whose capital was invested in it; that this agreement was in good faith designed, and was, in fact, extremely well calculated, to bring about the harmonious operation on a large scale of this public service in those particulars in which the Government, either from inability or from choice, had refrained from regulating it; and the question was asked whether an attempt in good faith by agreement between those independently engaged in a great industrial pursuit to subject the management of it to rules which would greatly conduce to the advantage of the business itself, and still more to the public interests of trade and commerce, could, by any stretch of the imagination even, be viewed as falling within that description of contracts regarded in the law as in *restraint of trade* and deserving to be made *criminal offenses*.

We do not perceive that the learned Solicitor-General has made any attempt even to meet this position, as it was made in the briefs and upon the oral argument.

2. Another main position was this: The several meritorious requirements which the service of railroad transportation ought to exhibit and without which great mischief and confusion, extremely detrimental to the trade and commerce of the country, would inevitably arise, were enumerated as follows:—

(1) Uniformity in rates.

(2) Stability in rates.

(3) Equality in rates.

(4) Dispatch and safety.

(5) Ease and convenience in shipping effected by classification and publicity.

(6) Reasonable rates.

It was then shown in detail that no one of these merits could be secured in the actual condition in which the business of railroad transportation was situated in this country without an effective agreement (whether formal or informal is of no consequence), substantially similar to the one in question; so that it could be justly said that the agreement was *necessary* to each one of the several requirements mentioned. Very copious extracts were made from the declarations of that body charged by Congress with the superintendence of the railway transportation service, which certainly proved that *concert of action* of this character is necessary for each of these purposes. And *concert of action* means *agreement*; and if *informal* agreement to these ends is useful and unobjectionable, *formal* agreement to the same ends must be more useful, because more effective.

We do not perceive that this necessity of such agreements has, in any one of the particulars mentioned, been controverted. We may therefore again with propriety ask, Is an agreement necessary to *uniformity* in rates, necessary to *stability* in rates, necessary to *equality* in rates, necessary to *dispatch and safety* in transportation, necessary to *ease and convenience in shipping* and necessary to *reasonable rates*, in restraint of trade or commerce? Must it not, on the other hand, be highly promotive of both.

3. The further position was taken that unless such agreements were allowed, one of three alternatives must follow: (1) That all railroad transportation be abandoned; or, (2) The consolidation of all competing railroads under a single ownership, either Governmental or private; or (3) That all competing railroad business must be carried on in constant and daily violation of criminal law; and that as neither of the first two alternatives could be contemplated as possible, the third must necessarily follow.

This position was supported under the Sixth point of the brief of the Joint Traffic Association by what are believed to be pertinent and conclusive reasons. It is not perceived that the learned Solicitor-General in his last effort has successfully controverted it, if indeed he has made any attempt to do so; and we may, therefore, again ask, whether an agreement in good faith designed to enable, and necessary in order to enable, the great business of railway transportation to be carried on without daily violation of the criminal law, can be said to fall within the class of agreements which restrain and injure trade, and are worthy of being made criminal offenses?

4. A further position was taken, which selected one of the above mentioned requirements of railway transportation, namely, *uniformity in rates*, and put it forward as not only necessary to the general efficiency of railway transportation, but necessary in order to save the Government itself from being the instrumentality of the most prodigious and cruel injustice to its own citizens. It was pointed out that railway transportation was not trade or commerce itself, not business itself, in its ordinary sense, but a *service* incidental to other business; a service, too, which it was the

first duty of Government to render: and that if Government had reserved to itself the performance of this service, the first rule which it would have adopted would have been to preserve its own neutrality in the competitive strifes of commerce and industry by establishing uniformity in *rates*, not only for all the patrons of a particular line of railroad, but for all the patrons depending upon parallel lines; that otherwise one producer or manufacturer could get his product or supplies to, or from, a market upon better terms than a rival depending upon the same market by another parallel road, and the Government itself would thus enrich some of its citizens and some places, while it impoverished other citizens and other places.

It was pointed out that the necessity of this uniformity in *rates* did not attach to the particular personality which operated the roads, but attached to the function itself, and was not less manifest when the public function was delegated to private hands than when the exercise of it was reserved to the Government itself. The result of this is that while competition may be very useful, as, up to a certain point, it certainly is, in all the *ordinary* business of life, it has, so far as the *rates imposed* are concerned, no proper place in the exercise of the great public business and function of *railway transportation*

This conclusion seems to follow so directly and unavoidably that confirmation of it drawn from other sources would seem hardly necessary; but in the argument offered by the appellees it was confirmed by pointing out that Congress itself had recognized and secured this uniformity in *rates* to the extent which its powers enabled it to secure it. It was further shown that wherever in the civilized world railway transportation was afforded, the service followed the same natural

law, and uniformity in *rates*, either by the action of the Government itself, or by that of the private individuals exercising the franchise, or by both, was everywhere the rule. It was further shown, as an evidence of the operation of the same natural law, that in this country, from the very commencement of competition in railway service, uniformity of *rates* brought about by agreement, formal or informal, had been the constant aim; that the end had been gained substantially, although with great difficulty, and with great imperfection, owing to the frequent breaches of agreement and consequent introduction of ruinous competition involving rate wars, and that the present effort was only an instance of the further prosecution of the effort, made necessary by the ineffectiveness of prior agreements and the prohibition of pooling, against which it had been supposed, rightly or wrongly, that there were special objections. It was further shown that all apprehensions of exorbitant exaction, or of the creation of monopolies, arising from attempts by agreement to secure uniformity in *rates*, were unfounded, the notorious fact being that nowhere in the world has it ever been known that the privilege of agreement had actually been made use of to effect monopolies, or establish unreasonable rates, and the fact being in this country that, notwithstanding the privilege of agreement, fully availed of, and of undoubted validity, until these recent prosecutions, railroad rates have steadily declined from about three cents a ton per mile to about one-half a cent per ton per mile—a decline not showing that the original rate of three cents was at all unreasonable, but showing the improvement and cheapening of the service effected by competition in the character of the service which is left unchecked by the agreement, and by a full

recognition of the fact on the part of the railway companies that their real interest always lies in increasing the bulk of traffic by reducing the rate to the lowest figure at which business can be fairly done.

It is not perceived that this line of argument has been even attempted to be controverted by this last effort of the learned Solicitor-General, and certainly the effort was not made by him on the oral argument.

Eighteenth.—Reference is made by the Solicitor-General in several places to the views which have been expressed by various courts and judges in relation to the benefits of competition and the evils of monopoly, and also to the public apprehensions upon this score. It is certainly true that such apprehensions are widely entertained, and on the other hand they are quite as widely declared to be without foundation. So far as actual decisions go, the subject is dealt with rather copiously in the brief of the Joint Traffic Association. An apprehension cannot well be refuted. Where there is no fact out of which it can justly arise the imagination may easily create it. It would be unfortunate, indeed, if questions of law depended, in any large degree, upon determining how far, in the absence of actual fact, *apprehensions* were well founded or justified. It seems to the undersigned that before such apprehensions should be taken into account and made the basis of legal conclusions, so far as railroad business is concerned, it might fairly be asked that some instance should be pointed out in which competing railroads have united together to form a monopoly of any sort, or to secure to themselves more than a fair reward for the service rendered. The thing is really impossible. The constant pressure from the patrons of every road upon its managers and officers is for lower rates, even when they know that the lower rates, if given, will be uniform, and furnish them with no

advantage over their rivals. They all think, and rightly think, that the lower they can offer their goods in the market the larger will be the amount taken. They all urge, and rightly urge, that what will be for their interest will also be for the interest of the railroad companies. The formation of a combination to put up rates to a high point, resulting, as it would, in a damaging diminution of traffic, is so entirely unwise for railroads, even from a selfish point of view, that it never will be, as it never has been, upon any important scale, resorted to.

Railroad rates can never escape from the influence of the great competitions of the world. If the Joint Traffic Association were united with all lines of water transportation and had absolute and unchallenged legal power to establish rates at any point, reasonable or unreasonable, for the whole vast region it serves, the great industrial interests of those regions would still be left in competition with like interests in the other parts of the nation, and the railroads which respectively serve the rival interests would be inevitably involved in the strife and be compelled to compete with each other. Any attempt on the part of railroads, united in an agreement for uniform rates and serving a particular region, to burden the interests they serve with high rates would at once cripple those interests and re-act to the ruin of the roads making the attempt. If the union embraced all the railroad and water transportation of the entire nation, a similar attempt would be equally disastrous. The manufacturers and producers of the United States are, and ever must be, competitors with the same classes in all other commercial nations, not only in supplying the wants of the seventy millions of their own people, but in supplying the other great markets of the world; and they will inevitably be crippled in that rivalry by any burden or charge which enhances the cost of any of their products, and the railroads which serve them would be full participants in any disastrous re-

sults which a short-sighted policy on their part would bring about.

There may, indeed, be a possibility, more theoretic than actual, that some two local competing roads might find, or think they had found, some local traffic, the amount of which was so little subject to change, that they might, with advantage to themselves, impose high rates upon it; but the field for such operations is so small, and the possible mischief flowing therefrom so doubtful, and minute in comparison, that the possibility is not worth thinking about as a factor in settling the great conclusions of public policy.

In the opinion pronounced by this Court in the Trans-Missouri case, large allusion was made to the varieties of opinion entertained in courts, in legislative bodies and among the people respecting the benefits and evils of competition. That opinion avoided, and properly avoided, in view of the *form* in which the question was made up and presented, any effort to weigh the differences and determine upon which side the balance fell. It declared, however, that it could not say that Congress had *not* entertainedthe fears and apprehensions referred to when it passed the Anti-Trust Act, and therefore that so long as the argument presented was whether the term *contracts in restraint of trade* included *all* such contracts, or such only as were unreasonable, it could not say that Congress acted upon the narrow interpretation.

Now, however, the question is put in its true shape. Congress has declared *what* contracts it intended to condemn. It is those only which injure trade by restraining it, and the question which it has imposed upon the Court to decide is whether, in any particular case, the particular agreement does restrain trade or commerce. In determing that question the Court is removed beyond the reach of apprehension or clamor of any description, except such as it shall find and determine to be well founded. Its task is to determine

whether this particular contract is in restraint of trade, and in the performance of that task all apprehension and clamor, except such as the Court believes to be founded in *reason and in truth* are wholly irrelevant. If this agreement will, in fact, from its *necessary* operation, restrain trade, it falls within the condemnation of the statute, notwithstanding the just purposes with which it was alleged to have been entered into, for no man can be heard to say that he does not intend the necessary consequence of his acts; but unless this conclusion can be reached the agreement is not open to the attack made upon it.

Lastly.—The learned Solicitor-General has reprinted in the form of an appendix the argument of Mr. Macfarlane in the Court below in support of his assertion that the agreement was a *pooling* contract.

Inasmuch as he made no point in his original brief, or upon the oral argument, that the contract was a pooling one, and was silent when the counsel for the appellees stated to him, on the oral argument, that they supposed that it was not his intention to raise that point, it seems unnecessary to take notice of this extract. The suggestion of the learned counsel is that this extract from Mr. Macfarlane's argument shows that all the objectionable features in pooling agreements are embraced in this contract. But where has he ascertained, and how are we to know, what the *objectionable* features in a pooling contract are? The way in which a *legislature* informs us what it deems to be *objectionable* is by prohibition. It objects to what it prohibits, and does not object to what it does not prohibit. To say, or to intimate, that there is a pooling of freights between railroad companies where each company is left to attract to itself all the business it can, and receives to itself alone the entire compensation for the traffic it carries, would be utterly extravagant. His suggestion, made upon the oral argument, that pooling was the only form of agreement known

among railroad companies at the time of the passage of the Anti-Trust Act is supported by no evidence, and is quite unfounded. Agreements of some sort have existed wherever uniformity of rates was seriously threatened by competition. Pooling was adopted only where other forms of agreement had proved ineffectual.

JAMES C. CARTER,
LEWIS CASS LEDYARD,
Of Counsel for Appellees.

DEC 23 1897

UNCONSTITUTIONALITY OF THE ANTI-TRUST ACT OF CONGRESS.

(CHAPTER 647, STATUTES OF 1890.)

Brief of de Forest & Willcox for Central R.R. of N.J.

Supreme Court of the United States.

Filed Dec. 21, 1897.

ON APPEAL FROM THE

Circuit Court of Appeals for the Second Circuit.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,
vs.
THE JOINT TRAFFIC ASSOCIATION ET AL.

No. 341.

Brief,

for the Central Railroad Company of New Jersey, Appellee.

ROBERT W. DE FOREST,
DAVID WILLCOX,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.



Supreme Court of the United States.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

OCTOBER TERM, 1897.

THE UNITED STATES, Appellant, vs. THE JOINT TRAFFIC ASSOCIATION ET AL.	No. 341.

BRIEF,

for the Central Railroad Company of New Jersey, appellee.

On July 2, 1890, an act was passed by the Congress of the United States entitled, "An act to protect trade and commerce "against unlawful restraints and monopolies" (26 Stat., 209, c. 647). The first section provides that "every contract, combination "in the form of trust or otherwise, or conspiracy in restraint of "trade or commerce among the several states or with foreign nations, "is hereby declared to be illegal."

In United States vs. Freight Association, 166 U. S., 290, it was held that this applies "to all contracts in restraint of inter-"state or foreign trade or commerce, without exception or limi-"tation," and is "not confined to those in which the restraint is "unreasonable" (pp. 291, 328). Accordingly, as to the agreement then under consideration, the court held that, though legal when made, it became illegal upon the passage of the act (pp. 291, 342).

The statute, as now construed, is, therefore, an attempt by Congress to limit the individual in making contracts regarding his own affairs by providing that he shall make no such contracts if they be in restraint of trade. It is held that the individual previously possessed the right to make reasonable contracts of that

character, but that this statute enacts that he shall have that right no longer, irrespective of any question regarding the nature or effect of the particular contract in restraint of trade involved—"without exception or limitation." Without any reference to the question whether or not they are prejudicial to the welfare of society, but merely as an arbitrary expression of the will of Congress, the act denounces as unlawful contracts in restraint of trade which were entirely lawful before its passage.

But "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is "that of the Fifth Amendment" (Monongahela Co. vs. United States, 148 U. S., 312, 336). "It is scarcely necessary to say that "the power given to Congress to regulate interstate commerce does "not carry with it any power to destroy or impair those guaranties" (Interstate Commission vs. Brimson, 154 U. S., 447, 479; Gibbons vs. Ogden, 9 Wheaton, 1, 196; Wilkinson vs. Leland, 2 Peters, 627, 657). If, then, this declaration of the will of Congress exceeds those limitations, the mere fact that it purports to be a regulation of commerce, lends it no support.

Manifestly, the statute, as now construed, does exceed the constitutional power of Congress. The right of the individual to make contracts regarding his own affairs is guaranteed by the provisions of the Fifth Amendment that "no person shall be * * "deprived of life, liberty or property, without due process of law "nor shall private property be taken for public use without just "compensation;" that right can be limited only so far as may be requisite for the security or welfare of society—by exercise of the police power. It is settled by authority that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society. Congress, therefore, is without power to prohibit generally all contracts in restraint of trade and the effort to do this invalidates the act.

Brief.

FIRST.

The right of the individual to make contracts regarding his own affairs is guaranteed by the Fifth Amendment; that right can be limited only so far as may be requisite for the security or welfare of society—by exercise of the police power.

As has been said, the Fifth Amendment provides that "no person shall be * * deprived of life, liberty or property, without "due process of law; nor shall private property be taken for public "use without just compensation." These constitutional guaranties secure to all persons freedom in the pursuit of their avocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor.

Liberty of action in the latter respect has been recognized since early times as a right of the individual; for in the leading case of Mitchel vs. Reynolds, decided by the Court of King's Bench in 1711 (1 P. Wms., 181, 188), it is said that the language of Magna Charta *nullus liber homo*, etc., *dissesietur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis*, etc., "have been *always* taken to extend to freedom of trade." In Printing Co. vs. Sampson, L. R., 19 Eq. Cas., 462, the court said (Sir GEORGE JESSEL, M. R.), "if there is one thing which more than "another public policy requires it is that men of full age and com-"petent understanding shall have the utmost liberty of contracting. "* * * Therefore, you have this paramount public policy to "consider—that you are not lightly to interfere with this freedom of "contract" (p. 465). So, too, this court not long since said that it "was justly urged that those rules which say that a given con-"tract is against public policy, should not be arbitrarily extended "so as to interfere with the freedom of contract" (Gibbs vs. Consolidated Gas Company of Baltimore, 130 U. S., 396, 408). In addition, it is clear that limitations upon the use of property, so far as they go, destroy its value. "The value of property results from the use to which it is put, "and varies with the profitableness of that use, present and pros-"pective, actual and anticipated. There is no pecuniary value out-"side of that which results from such use" (Cleveland Co. vs.

Brief.

Backus, 154 U. S., 439, 445; Postal Co. vs. Adams, 155 U. S., 697; People *ex rel.* Manhattan Institution vs. Otis, 90 N. Y., 48; Forster vs. Scott, 136 N. Y., 577, 384).

The legislative branch of the government can impose limitations upon these rights of liberty and property only in the legitimate exercise of the police power. Any attempted limitations thereon which exceed the police power are unconstitutional and void. They deprive the individual of his liberty and property without due process of law, and take his property without just compensation.

> In Allgeyer vs. Louisiana, 165 U. S., 578, the court considered a statute of Louisiana providing that any person, firm or corporation who in any manner whatever does an act in that state to effect, for himself or for another, insurance on property then in the state, in any marine insurance company which has not complied in all respects with the laws of the state, shall be subject to a fine. The facts were that the defendant had made an open contract of insurance in the state of New York with an insurance company of that state, where the premiums were paid, and the losses were to be paid. He had, however, in Louisiana, sent notice to the insurance company in New York advising it of the property within the state of Louisiana to be covered by the policy. The court held that the statute was unconstitutional. It said, "it is natural " that the state court should have remarked that there is in " this 'statute an apparent interference with the liberty of " 'defendants in restricting their rights to place insurance on " 'property of their own whenever and in what company they " 'desired.' Such interference is not only apparent, but it is " real, and we do not think that it is justified for the pur- " pose of upholding what the state says is its policy with re- " gard to foreign insurance companies which had not com- " plied with the laws of the state for doing business within " its limits. In this case the company did no business within " the state, and the contracts were not therein made. The " Supreme Court of Louisiana says that the act of writing " within that state the letter of notification was an " act therein done to effect an insurance on property " then in the state, in a marine insurance company " which had not complied with its laws, and such act " was, therefore, prohibited by the statute. As so con- " strued we think the statute is a violation of the Fourteenth " Amendment of the Federal Constitution, in that it deprives " the defendants of their liberty without due process of law. " The statute which forbids such act does not become due " process of law, because it is inconsistent with the pro-

"visions of the Constitution of the Union. The liberty "mentioned in that amendment means not only the right of "the citizen to be free from the mere physical restraint of "his person, as by incarceration, but the term is deemed "to embrace the right of the citizen to be free in the enjoy- "ment of all his faculties; to be free to use them in all law- "ful ways; to live and work where he will; to earn his "livelihood by any lawful calling; to pursue any livelihood "or avocation, and *for that purpose to enter into all contracts "which may be proper, necessary and essential to his carrying "out to a successful conclusion the purposes above mentioned*" (pp. 588, 589).

In re Grice, 79 Fed. Rep., 627, in holding the anti-trust law of Texas to be unconstitutional, the court expressed the same rule in these words: "One of the most sacred "rights of liberty is the right of contract. All of the rights "of contract which are necessary for the carrying on of "ordinary business affairs are protected by the Constitution, "and are not capable of being restrained by legislative "action" (p. 641).

In People vs. Gillson, 109 N. Y., 389, the statute under consideration prohibited the sale or disposal of any article of food, or any offer, or attempt to do so, upon any repre- sentation or inducement that anything else would be delivered as a gift, prize, premium or reward to the purchaser. It was held that this was violative of the constitutional provision securing to every person liberty and property, unless he was deprived thereof by due process of law, and was not valid as a proper exercise of the police power of the state, or as an exercise of the legislative power to enact what shall constitute a crime. The court said, "the following "propositions are firmly established and recognized; a "person living under our constitution has the right to adopt "and follow such lawful industrial pursuit, not injurious to "the community, as he may see fit. The term 'liberty,' as "used in the Constitution, is not dwarfed into mere freedom "from physical restraint of the person of the citizen as by "incarceration, but is deemed to embrace the right of man "to be free in the enjoyment of the faculties with which he "has been endowed by his Creator, subject only to such "restraints as are necessary for the common welfare. "*Liberty, in its broad sense, as understood in this country, "means the right not only of freedom from servitude, "imprisonment or restraint, but the right of one to use his "faculties in all lawful ways, to live and work where he will, "to earn his livelihood in any lawful calling, and to pursue "any lawful trade or avocation*" (pp. 398, 399). After considering the provisions of the statute, the court said

further, " a person engaged as a retailer of coffee might very " well think that he could greatly enlarge the amount of his " trade by doing precisely what was done by the defendant " in this case, and that, while his profits on the same amount " of coffee sold would be smaller than if he gave no present, " yet, by the growth of his trade, his income at the end of " the year would be more than by the old method. This " statute, if valid, steps in to prevent his adopting such a " course to procure trade, and from it to secure an income " and livelihood for himself and family. He is thus " restrained in the free enjoyment of his faculties, which he " ought to have the right and liberty to use in the way of " creating or adopting plans for the increase and growth of " his trade, business or occupation, unless such restraint is " necessary for the common welfare" (pp. 399, 400). "It can- " not be truthfully maintained that this legislation does not " seriously infringe upon the liberty of the owner or dealer in " food products to pursue a lawful calling in a proper " manner, or that it does not, to some extent at least, " deprive a person of his property by curtailing his power of " sale, and *unless this infringement and deprivation are* " *reasonably necessary for the common welfare, or may be said* " *to fairly tend in that direction or to that result, the legis-* " *lation is invalid as plainly violative of the constitutional* " *provision under discussion*" (p. 400).

In Forster vs. Scott, 136 N. Y., 577, the statute provided that no compensation should be allowed, to the owner of land taken for a street, for any building erected or placed thereon after the filing of a map of the street as prescribed by a section of the act. It was held that this imposed a restriction upon the use of the land which amounted to an encumbrance, and so was unconstitutional. The court said, " the validity of a law is to be determined by its purpose and " its reasonable and practical effect and operation, though " enacted under the guise of some general power which the " legislature may lawfully exercise, but which may be and " frequently is used in such a manner as to encroach, by de- " sign or otherwise, upon the positive restraints of the Con- " stitution. What the legislature cannot do directly, it can- " not do indirectly, as the constitution guards as effectually " against insidious approaches as an open and direct attack. " Whenever a law deprives the owner of the beneficial use " and free enjoyment of his property, or imposes " restraints upon such use and enjoyment, that " materially affect its value without legal process " or compensation, it deprives him of his property " within the meaning of the Constitution. *All that is bea-*

"*eficial in property arises from its use and the fruits of that* "*use, and whatever deprives a person of them, deprives him of* "*all that is desirable or valuable in the title and possession.* "*It is not necessary in order to render a statute obnoxious* "*to the restraints of the Constitution, that it must in* "*terms or in effect authorize an actual physical taking of* "*the property or the thing itself, so long as it affects its free* "*use and enjoyment, or the power of disposition at the will* "*of the owner.* Though the police and other powers of "government may sometimes incidentally affect property "rights, according to established usages and recognized "principles familiar to courts, yet even these powers are not "without limitations, as they can be exercised only to pro- "mote the public good, and are always subject to judicial "scrutiny" (p. 584).

Numerous other authorities in support of these principles will be found in the appendix to this brief (pp. 21–29, *infra*).

The Constitution, therefore, guarantees to every person the right to transact such business and to hold such property as he sees fit, and to make such contracts and arrangements as may be incidental thereto. Congress has no general power to prescribe rules dictated merely by its fancy, regarding the manner in which this shall be done. These rights, like all constitutional rights, cannot be affected by a legislative declaration that their exercise shall be deemed illegal.

Even when the business or property sought to be regulated is such as is said to be "affected with a public interest" (Munn vs. Illinois, 94 U. S., 113; People vs. Budd, 117 N. Y., 1; 143 U. S., 517), the extent of the legislative power is to impose merely such limitations upon freedom of the right to make contracts in connection therewith as are required by the welfare of society and are reasonable under all the circumstances of the case. Any action imposing limitations in excess of this, to that extent infringes upon the rights to liberty and property secured by the constitution. Whether limitations attempted by statute are in fact within the legislative power, is not settled by any legislative declaration upon the subject. That is a judicial question which the courts must determine (Railroad Commission Cases, 116 U. S., 307, 331; Chicago Railway Co. vs. Minnesota, 134 U. S., 418; Reagan vs. Trust Co., 154 U. S., 362; St. Louis Co. vs. Gill, 156 U. S., 649; Covington Co. vs. Sandford, 164 U. S., 578, 592), taking "into consideration

" the interests both of the public and of the owner of the property " (Covington Co. vs. Sandford, 164 U. S., 578, 597 ; Interstate Commerce Commission vs. Railway Company, 167 U. S., 479, 499).

In the present case, however, the limitations imposed upon freedom of the right to make contracts do not apply merely to business or property " affected with a public interest." The action of Congress rests upon no such ground. The statute applies without exception to every sort of business or property, even although the same, in the eye of the law, be not devoted to the use of the public in any respect and do not depend in the least upon any grant by the state of privileges or franchises. So, too, corporations and individuals are alike within its scope.

The act can, therefore, be supported if at all only as an exercise of the police power. If it does not possess that character, the denunciation by Congress of such contracts as illegal cannot deprive any person of his liberty and property by destroying his immemorial (*infra*, pp. 9–16) right to make contracts in reasonable restraint of trade. " Where rights of property are admitted to exist, the " legislature cannot say that they shall exist no longer ; nor will it " make any difference, although a process and a tribunal are ap- " pointed to execute the sentence " (Wynehamer vs. People, 13 N. Y., 378, 393. " The power of making bargains for individuals has " not been delegated to any branch of the government " (Taylor vs. Porter, 4 Hill, 140, 143). " The legislature may not, under the guise " of protecting the public interests, arbitrarily interfere with private " business, or impose unusual and unnecessary restrictions upon law- " ful occupations. In other words, its determination as to what is a " proper exercise of its police powers is not final or conclusive, but " is subject to the supervision of the courts " (Lawton vs. Steele, 152 U. S., 133, 137 ; Colon vs. Lisk, 153 N. Y., 188, 196).

" When and how far the police power may be legitimately exer- " cised with regard to these subjects must be left for determination to " each case as it arises " (Allgeyer vs. Louisiana, 165 U. S., 578, 590). The court, therefore, must determine whether the restrictions now sought to be imposed upon the constitutional right of freedom to make contracts come within the police power. It must decide whether the mere fact that a contract or arrangement—whatever its purpose or character—may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society.

Brief.

SECOND.

It is settled by authority that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society.

Questions regarding the extent of the police power usually arise in connection with statutes professing by their terms to have been passed in order to meet some requirement of the public health or welfare. But the present statute makes no profession of the sort. As an expression of the legislative judgment as to the manner in which private affairs shall be conducted, it baldly pronounces illegal a large volume of the contracts and arrangements which have hitherto been legal and usual in the affairs of life and which, in part, have given to liberty and property their substantial value.

Can such an arbitrary destruction of the rights of liberty and property be sustained upon the ground that it is necessary to the security or welfare of society? If not, under the rules already stated, the action attempted is beyond the legislative power.

The decision of this question presents no difficulty, for it is settled by overwhelming authority that the mere fact that a contract or arrangement is in restraint of trade does *not* render it injurious to the public or prejudicial to the welfare or security of society. That circumstance alone is no criterion of the character of the contract or arrangement in that regard. This was ruled as long ago as 1711, in the leading case of Mitchel vs. Reynolds, 1 P. Wms., 181. The same principle has just been stated in United States vs. Freight Association, 166 U. S., 290, where the court said that "contracts in restraint of "trade have been known and spoken of for hundreds of years, "both in England and in this country, and the term includes all "kinds of those contracts which, in fact, restrain or may restrain "trade. Some of such contracts have been held void and unen- "forceable in the courts by reason of their restraint being unreason- "able, while others have been held valid because they were not of "that nature. A contract may be in restraint of trade and still be "valid at common law" (p. 328). At common law "contracts "of private individuals or corporations touching upon restraints in

" trade must be unreasonable in their nature to be held void" (p. 334).

In Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64, a steamboat company sold a steamer subject to a stipulation that the purchaser would not employ it for ten years from date in any waters of California. The court held that the contract was not void as in restraint of trade. It said, " cases must be judged according to their circumstances " and can only be rightly judged when the reason and grounds " of the rule are carefully considered. There are two principal " grounds on which the doctrine is founded, that a contract " in restraint of trade is void as against public policy. One " is the injury to the public by being deprived of the re- " stricted party's industry; the other is the injury to the " party himself by being precluded from pursuing his occupa- " tion, and thus being prevented from supporting himself and " his family. It is evident that both these evils occur when " the contract is general, not to pursue one's trade at all, or " not to pursue it in the entire realm or country. The coun- " try suffers the loss in both cases; and the party is deprived " of his occupation, or is obliged to expatriate himself in " order to follow it. A contract that is open to such grave " objection is clearly against public policy. But if neither " of these evils ensue, and if the contract is founded on a " valid consideration and a reasonable ground of benefit to " the other party, it is free from objection, and may be " enforced. In accordance with these principles it is well " settled that a stipulation by a vendee of any trade, busi- " ness or establishment, that the vendor shall not exercise " the same trade or business, or erect a similar establish- " ment within a reasonable distance, so as not to interfere " with the value of the trade, business or thing purchased, " is reasonable and valid. In like manner a stipulation by " the vendor of an article to be used in a business or trade " in which he is himself engaged, that it shall not be used " within a reasonable region or distance, so as not to inter- " fere with his said business or trade, is also valid and bind- " ing. The point of difficulty in these cases is to determine " what is a reasonable distance within which the prohibitory " stipulation may lawfully have effect. And it is obvious, at " first glance, that this must depend upon the circumstances " of the particular case, although, from the uncertain " character of the subject, much latitude must be allowed to " the judgment and discretion of the parties. It is clear " that a stipulation that another shall not pursue his trade " or employment at such a distance from the business of

"the person to be protected, as that it could not possibly "affect or injure him, would be unreasonable and absurd. "On the other hand, a stipulation is unobjectionable and "binding which imposes the restraint to only such an extent "of territory as may be necessary for the protection of the "party making the stipulation, provided it does not violate "the two indispensable conditions, that the other party be "not prevented from pursuing his calling, and that the "country be not deprived of the benefit of his exertions" (pp. 68, 69). This case is cited as stating the law correctly in the dissenting opinion in United States vs. E. C. Knight Co., 156 U. S., 1, 24.

In Gibbs vs. Baltimore Gas Co., 130 U. S., 396, the question was again considered, and the court stated the rules as follows (p. 409): "The decision in Mitchel vs. Reynolds, 1 "P. Wms., 181, s. c., Smith's Leading Cases, 407, 7th Eng. "Ed.; 8th Am. Ed., 756, is the foundation of the rule in "relation to the invalidity of contracts in restraint of trade; "but, as it was made under a condition of things and a state "of society different from those which now prevail, the rule "laid down is not regarded as inflexible, and has been con- "siderably modified. Public welfare is first considered, and "if it be not involved, and the restraint upon one party is "not greater than protection to the other party requires, "the contract may be sustained. *The question is, whether,* "*under the particular circumstances of the case and the nature* "*of the particular contract involved in it, the contract is, or is* "*not, unreasonable* (Rousillon v. Rousillon, 14 Ch. D., 351; "Leather Cloth Co. v. Lorsont, L. R., 9 Eq., 345)."

In Fowle vs. Park, 131 U. S., 88, the court held that a contract relating to a patent medicine which communicated its ingredients in confidence, and provided in substance that the parties should enjoy a monopoly of the sale of it, each within a defined region in the United States, and that it should not be sold below a certain rate or price, was not unreasonable or invalid as in restraint of trade. The court repeated the rules above stated.

In Diamond Match Co. vs. Roeber, 106 N. Y., 473, the court considered a contract by which defendant sold his manufactory to a corporation engaged in the manufacture of the same character of goods. Defendant also agreed that he would not engage in any of the states or territories, excepting two, in the manufacture of such goods. The court held that this agreement was valid. It said, "the laws no longer favor "the granting of exclusive privileges, and, to a great extent, "business corporations are practically partnerships, and may "be organized by any persons who desire to unite their

" capital or skill in business, leaving a free field to all others
" who desire for the same or similar purposes to clothe them-
" selves with a corporate character. The tendency of recent
" adjudications is marked in the direction of relaxing the
" rigor of the doctrine that all contracts in general restraint
" of trade are void irrespective of special circumstances.
" *Indeed, it has of late been denied that a hard and fast rule*
" *of that kind has ever been the law of England* (*Ronsillon* vs.
" *Ronsillon, 14 L. R. Ch. Div., 351*). The law has, *for cen-*
" *turies, permitted contracts in partial restraint of trade when*
" *reasonable;* and in Horner vs. Graves, 7 Bingham, 735,
" Chief-Justice TINDAL considered a true test to be 'whether
" ' the restraint is such only as to afford a fair protection to
" ' the interests of the party in favor of whom it is given, and
" ' not so large as to interfere with the interests of the public.'
" When the restraint is general, but at the same time is co-
" extensive only with the interest to be protected, and with
" the benefit meant to be conferred, there seems to be no
" good reason why, as between the parties, the contract is not
" as reasonable as when the interest is partial, and there is a
" corresponding partial restraint. * * *It is clear that*
" *public policy and the interests of society favor the utmost*
" *freedom of contract within the law, and require that business*
" *transactions should not be trammeled by unnecessary restric-*
" *tions*" (pp. 481–483). * * "We are not aware of any
" rule of law which makes the motive of the covenantee the
" test of the validity of such a contract. On the contrary, we
" *suppose a party may legally purchase the trade and business*
" *of another for the very purpose of preventing competition,*
" *and the validity of the contract, if supported by a consid-*
" *eration, will depend upon its reasonableness as between the*
" *parties.* Combinations between producers to limit pro-
" duction and to enhance prices are or may be unlawful, *but*
" *they stand on a different footing*" (p. 483).

In Hodge vs. Sloan, 107 N. Y., 244, the grantor of certain premises was engaged in the sale of building sand. He inserted a covenant in the deed that the premises in question should not be used for similar purposes. The court held that there was nothing in this prejudicial to the public interests. It said, " assuming with the respondent that the covenant is
" in restraint of trade, it is still valid if it imposes no restric-
" tion upon one party which is not beneficial to the other,
" and was induced by a consideration which made it reason-
" able for the parties to enter into it, or, in other words, if it
" was a proper and useful contract, or such as could not be
" disregarded without injury to a fair contractor. This is the
" doctrine of Chappel vs. Brockway, 21 Wend., 157, and Ross

" vs. Sadgbeer, *id.*, 166, derived by a learned court from the " leading case of Mitchel vs. Reynolds, 1 P. Wms., 181, and " an examination of subsequent decisions" (pp. 248, 249). " Many other instances of restraint might be referred " to, and, where it is of such nature as concerns the " mode of occupying or dealing with the property purchased " in the way of business operations or even the omission of " all business or certain kinds of business, or the erection or " non-erection of buildings upon the property, we see no " reason to doubt the validity of an agreement, fair and valid " in other respects, which secures that restraint" (p. 251).

In Leslie vs. Lorillard, 110 N. Y., 519, the plaintiff was a stockholder in a steamship company which had entered into an agreement with the defendant Lorillard and another company controlled by him, that they should discontinue running steamers in opposition to those of the company first aforesaid. In consideration of such agreement the company first aforesaid agreed to pay certain sums of money. This action was brought to restrain payments in accordance with such agreement upon the ground that it was invalid as being in restraint of trade. The court held that the agreement was valid. It said, " when the provisions of agreements in " restraint of competition tend beyond measures for self- " protection and threaten the public good in a distinctly ap- " preciable manner, they should not be sustained. *The ap- " prehension of danger to the public interests, however, should " rest on evident grounds, and courts should refrain from " the exercise of their equitable powers in interfering with " and restraining the conduct of the affairs of individuals or " of corporations unless their conduct, in some tangible form, " threatens the welfare of the public.* * * Under the authority " of (Diamond Match Co. vs. Roeber) it may be said that no " contracts are void as being in general restraint of trade, " where they operate simply to prevent a party from en- " gaging or competing in the same business. * * The " doctrine held by this court in Diamond Match Company vs. " Roeber should control in the case at bar, and *these contracts, " therefore, cannot be considered objectionable on the ground that " they restrained competition.* Whether competition in this " particular business would be a public benefaction or its re- " straint a source of prejudice, we are unable, of course, to " judge. *I do not think that competition is invariably a public " benefaction, for it may be carried on to such a degree as to " become a general evil*" (pp. 533, 534).

In Tode vs. Gross, 127 N. Y., 480, the defendant was the owner of a cheese factory and engaged in manufacturing

several varieties of cheese by a secret process known only to her and her agents. She entered into an agreement with the plaintiffs providing that she should sell them the factory and its belongings and communicate to them the secret of the manufacture; that she and her agents should refrain from communicating said secret to anyone else, and that, after a certain date, they should refrain from making or selling said cheese. The court held that this was valid. It said that, "it imposed no restriction upon either "that was not beneficial to the other by enhancing the price "to the seller or protecting the purchaser. Recent cases "make it very clear that *such an agreement is not opposed to* "*public policy*, even if the restriction was unlimited as to both time and territory" (p. 485).

In Matthews vs. Associated Press, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted a by-law prohibiting its members from receiving or publishing the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The court held that the by-law was reasonable and valid. It said, "the greater "the number belonging to the organization, the larger will "be its income and the greater amount it will be able to "spend for making the collection of news, and the more "efficient and valuable such collection will be. *To suppress* "*competition in such chosen field among themselves* and to thus "enhance the value of the property and the conveniences "arising from the extended use of the means and opportuni- "ties of the association, it would seem most appropriate to "provide that the members of such association should not "take news from any other" (p. 341).

In Lough vs. Outerbridge, 143 N. Y., 271 (reargued and affirmed on previous opinion, 145 N. Y., 601), a steamship company, defendant, was engaged in carrying freight to the West Indies. A casual steamer about once in every six weeks sailed for the same ports. The company, during the week when the casual steamer sailed, offered to carry all freight for those shipping exclusively by its line at a rate greatly reduced below the regular rate, which was itself reasonable. The plaintiff sought by suit in equity to compel the defendant company to carry freight for it at the reduced rate without any agreement upon its part to ship exclusively by the company's steamers. The court held that this arrangement was lawful. It said, "the mere fact "that the transportation business between the two points "in question was in the hands of the defendants did

"not necessarily create a monopoly, if the general rates "maintained were reasonable and just. * * *When "*the service is performed for a reasonable and just hire,* "*the public have no interest in the question whether one or* "*many are engaged in it. The monopoly which the law views* "*with disfavor is the manipulation of a business in which the* "*public are interested in such a way as to enable one or a few* "*to control and regulate it in their own interest, and to the* "*detriment of the public by exacting unreasonable charges.* But "when an individual or a corporation has established a busi- "ness of a special and limited character, such as the defend- "ants in this case had, they have a right to retain it by "the use of all lawful means" (143 N. Y., 282). "On this "branch of the argument the remarks of Lord COLERIDGE, in "the case of the Mogul S. S. Co. vs. McGregor, L. R. (21 Q. "B. Div.) 544, are applicable: 'The defendants are traders "'with enormous sums of money embarked in their advent- "'ure, and naturally and allowably desire to reap a profit "'from their trade. They have a right to push their lawful "'trades by all lawful means. They have a right to endeavor "'by lawful means to keep their trade in their own hands, "'and by the same means to exclude others from its benefits, "'if they can. Amongst lawful means is certainly included "'the inducing by profitable offers customers to deal with "'them rather than with their rivals. It follows that they "'may, if they see fit, endeavor to induce customers to deal "'with them exclusively by giving notice that only to ex- "'clusive customers will they give the advantage of their "'profitable offers'" (143 N. Y., 283).

In Central Shade Roller Co. vs. Cushman, 143 Mass., 353, three manufacturers of a certain kind of curtain fixture, desiring to avoid competition, formed a corporation in which they were the only stockholders, and an agreement was executed by the corporation and the manufacturers, by the terms of which the manufacturers gave the corporation the sole right to sell said fixture for three years, the corporation agreeing to buy at a specified price all that the manufacturers might make, and the manufacturers acting as the selling agents of the corporation and receiving a commission on the goods sold by them. It was held that the agreement was not void as against public policy. The court said, "even if such an "agreement tends to raise the price of the commodity, it is "one which the parties have a right to make. To hold "otherwise would be to impair the right of persons to make "contracts and to put a price on the products of their own in- "dustry" (p. 364). The same thing was held in Gloucester Co. vs. Russia Co., 154 Mass., 92.

Brief.

In Mogul Steamship Co. vs. McGregor, App. Cas., 1892, p. 25, owners of ships formed an association to regulate the number of ships, the division of cargoes and the freights to be demanded, including a rebate of five per cent to those who shipped solely by the association's steamers. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavor to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs and reduced freights to a point so low that the plaintiffs were obliged to carry at unremunerative rates. The associated owners also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of five per cent would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. It was held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the execution of the agreement could not be enjoined.

In Nordenfelt vs. Maxim Co., App. Cas., 1894, p. 535, an inventor sold his invention and covenanted that he would not for twenty-five years engage in manufacturing similar goods. It was held that this agreement was not wider than was necessary for the protection of the purchaser, nor injurious to the public, and that it was, therefore, valid and might be enforced by injunction.

To the same effect are Kearney vs. Taylor, 15 How., U. S., 494, 520; Wicker vs. Hoppock, 6 Wall, 94; *In re* Greene, 52 Fed. Rep. 104; Dueber Watch Co. vs. Howard Co., 55 Fed. Rep., 851, 66 Fed. Rep., 637; U. S. Chemical Co. vs. Provident Chemical Co., 64 Fed. Rep., 946; Continental Co. vs. Board, 67 Fed. Rep., 310; *In re* Grice, 79 Fed. Rep., 627; Marsh vs. Russell, 66 N. Y., 288; Marie vs. Garrison, 83 N. Y., 14, 28; Hopkins vs. Ensign, 122 N. Y., 144; National Wall Paper Co. vs. Hobbs, 90 Hun, 288; Phippen vs. Stickney, 3 Metcalf, 384.

There is nothing inconsistent with these rules in cases regarding monopolies, such as Arnot vs. Pittston Co., 68 N. Y., 558; Judd vs. Harrington, 139 N. Y., 105; People vs. Sheldon, 139 N. Y., 251; People vs. Milk Exchange, 145 N. Y., 267; Morris Run Co. vs. Barclay Co., 68 Pa. St., 173; Salt Co. vs. Guthrie, 35 Ohio St., 666; People *ex rel.* Peabody vs. Gas Co., 130 Ill., 268; Richardson vs. Buhl, 77 Mich., 632. Those were instances of combinations to effect an unlawful purpose—the establishment of a monopoly; the combination was the *gravamen* of the matter. But the provisions

of the statute now under discussion establish as the test of illegality, not a *combination* to make any contract or arrangement; not anything which is unlawful otherwise than as these provisions give it that character. The test is the result in restraint of trade of any contract or combination, however remote that result may be from the main object of the contract or combination, and however incidental and subordinate to its main effect.

But it is held by authority that contracts in restraint of trade are entirely distinct from contracts establishing monopolies (United States vs. E. C. Knight Co., 156 U. S., 1, 24, 25; Diamond Match Co. vs. Roeber, 106 N. Y., 483; Lough vs. Outerbridge, 143 N. Y., 282). And this is recognized in the very title of the act now involved, which states as its purpose the protection of trade against unlawful "restraints *and* monopolies." Moreover, the provisions of the first section of the act now under discussion apply by their terms only to contracts and combinations in restraint of trade, while later sections contain the provisions of the act upon the subject of monopolies. Both the authorities and this statute itself, therefore, recognize the distinction between combinations to establish monopolies regarding articles in common use and contracts in restraint of trade.

But the provisions of the statute now under discussion do not prohibit merely combinations for the purpose of establishing monopolies. Irrespective of that purpose or that result, they prohibit all contracts or arrangements whereby trade may be restrained. The element of monopoly may be entirely lacking; but, if a contract or arrangement restrains trade, these provisions declare it illegal—"without exception or limitation" (United States vs. Freight Association, 166 U. S., 290, 328). The two subjects of monopolies and of contracts merely in restraint of trade are clearly quite distinct, and authorities as to monopolies have no bearing upon these statutory provisions which relate wholly to the latter subject.

It is firmly settled, then, that the mere fact that contracts or arrangements restrain trade in some degree, does *not* render them prejudicial to the security or welfare of society.

THIRD.

Congress, therefore, is without authority to prohibit generally all contracts in restraint of trade and the effort to do this invalidates the act.

This necessarily follows from the principles and authorities already stated. The constitutional guaranties contained in the Fifth Amendment secure to all persons freedom to make contracts and to dispose of their property at will. The only limitation of this right is the police power. That power can be exercised only so far as may be requisite for the security or welfare of society. It is held by controlling authority that the mere fact that a contract or arrangement may restrain trade does *not* render it prejudicial to the security or welfare of society. That fact alone, therefore, does not render the contract or arrangement a legitimate subject for exercise of the police power. Accordingly, the attempt of Congress to prohibit contracts or arrangements because they possess that character, is void because it infringes upon the constitutional guaranties of liberty and property.

As already said, the statute is held to apply "to all contracts "in restraint of interstate or foreign trade or commerce with- "out exception or limitation" (United States vs. Freight Association, 166 U. S., 290, 328). The extent to which this limits the freedom and destroys the property of the individual can scarcely be exaggerated. For it needs no argument to show that contracts and combinations which are most ordinary and indispensable have the effect of restraining trade. As examples may be suggested all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or mer-

chant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; a covenant in a deed restricting the use of real estate. The effect of most business contracts or combinations is to restrain trade in some degree.

The precise purpose of the present statute as now construed (United States vs. Freight Association, 166 U. S., 290) is to deprive the citizen of the rights which these overwhelming authorities hold that he possesses in this regard. But, as already abundantly shown, the legislature cannot affect those rights by a mere general declaration that their exercise shall be illegal. To quote again from Wynehamer vs. People (13 N. Y., 378, 393), "where rights of property are admitted to exist, the legislature can-"not say they shall exist no longer." As was said in a case where a much less extensive destruction of property rights was attempted, "depriving an owner of property of one of its essential at-"tributes, is depriving him of his property within the "constitutional provision, and a legislative declaration that, "upon the publication of notice, a negotiable security shall no "longer be transferable is not due process of law, working a "forfeiture of the right given by the contract" (People *ex rel.* "Manhattan Institution vs. Otis, 90 N. Y., 48, 52). "The legis-"lature is not vested with the power to arbitrarily provide "that any procedure it may choose to declare shall be regarded "as due process of law. If it possessed that power the guar-"antees of the constitution would be rendered unavailing, and "private rights of citizens would be within its absolute control" (Colon vs. Lisk, 153 N. Y., 188, 195, 196). "The legislature may "not, under the guise of protecting the public interests, arbitrarily "interfere with private business or impose unusual and unnecessary "restrictions upon lawful occupations. In other words, its deter-"mination as to what is a proper exercise of its police powers is "not final or conclusive, but is subject to the supervision of the "courts" (Lawton vs. Steele, 152 U. S., 133, 137).

The presence of these unconstitutional provisions invalidates the statute. Irrespective of any question of combination, these provisions denounce as illegal all contracts or arrangements, whether

made by corporations or individuals, in restraint of trade. This is inconsistent with the constitutional guaranties of liberty and property. These provisions express the principal intention of Congress in passing the statute. Indeed, they are practically its only substantive provisions—all else is penalty and procedure. Without them the act could not stand; they are inseparable from the remainder of the act.

Under well-settled rules the presence of these unconstitutional provisions renders the act wholly void (The Trade-Mark Cases, 100 U. S., 82, 98, 99; Spraigue vs. Thompson, 118 U. S., 90, 95; Baldwin vs. Franks, 120 U. S., 678, 685; Leloup vs. Mobile, 127 U. S., 640, 647; Pollock vs. Trust Co., 158 U. S., 601, 637; Wynehamer vs. People, 13 N. Y., 378, 486, 487; Jones vs. Jones, 104 N. Y., 234; Lawton vs. Steele, 119 N. Y., 226, 241; Rathbone vs. Wirth, 150 N. Y., 459, 477, 478, 479).

CONCLUSION.

The act is unconstitutional and the decree should, therefore, be affirmed.

ROBERT W. de FOREST,
DAVID WILLCOX,
Of Counsel for the Central Railroad Company of New Jersey, Appellee.

APPENDIX.

Further authorities regarding the right to freedom in making contracts and the constitutional guaranties thereof (see p. 7, *supra*).

In Shaver vs. Pennsylvania Co., 71 Fed. Rep., 931, a statute of Ohio provided that no corporation should require persons entering into its employment to waive any future claim for damages for personal injuries. It was held that such a statute violated the Fourteenth Amendment, by depriving persons affected by it of their liberty of contract without due process of law.

In Jones vs. Great Southern Hotel Co., 79 Fed. Rep., 477, a mechanics' lien statute attempted to give a sub-contractor a lien without regard to the state of the account between the owner of the building and the principal contractor, and in effect required the owner to pay to the subcontractor in money in order to discharge his lien, although the owner might have contracted with the principal to pay him by the transfer of property. It was held that this interfered with the right of the owner to make his own contracts, and was unconstitutional.

In Commonwealth vs. Perry, 155 Mass., 117, a statute provided that no employer should impose a fine upon any employee engaged at weaving or withhold his wages in whole or in part for imperfections that might arise during the process of weaving. It was held that this was unconstitutional for the reason that it deprived the parties to whom it applied of the property right to employ weavers and make proper contracts with them.

In re Jacobs, 98 N. Y., 98, the statute under consideration was "An Act to improve the public health by prohibiting the manufacture "of cigars and preparation of tobacco in any form in tenement houses "in certain cases." The court held the act to be unconstitutional. It said, "it is plain that this law interferes with the profitable and free "use of his property by the owner or lessee of a tenement house "who is a cigarmaker, and trammels him in the application of his "industry and the disposition of his labor, and thus, in a strictly "legitimate sense, it arbitrarily deprives him of his property and "of some portion of his personal liberty. The constitutional

" guaranty that no person shall be deprived of his property with-
" out due process of law may be violated without the physical
" taking of property for public or private use. Property may be de-
" stroyed, or its value may be annihilated; it is owned and kept for
" some useful purpose and it has no value unless it can be used.
" Its capability for enjoyment and adaptability to some use are
" essential characteristics and attributes without which property
" cannot be conceived, and hence any law which destroys it or its
" value, or takes away any of its essential attributes, deprives the
" owner of his property. The constitutional guaranty would be of
" little worth if the legislature could, without compensation destroy
" property or its value, deprive the owner of its use, deny him
" the right to live in his own house or to work at any lawful trade
" therein" (p. 105). "So, too, one may be deprived of his liberty
" and his constitutional rights thereto violated without the actual
" imprisonment or restraint of his person. Liberty, in its broad
" sense, as understood in this country, means the right, not only of
" freedom from actual servitude, imprisonment or restraint, but the
" right of one to use his faculties in all lawful ways, to live and
" work where he will, to earn his livelihood in any lawful
" calling and to pursue any lawful trade or avo-
" cation. All laws, therefore, which impair or tram-
" mel these rights, which limit one in his choice of a
" trade or profession, or confine him to work or live in a specified
" locality, or exclude him from his own house, or restrain his other-
" wise lawful movements (except as such laws may be passed in the
" exercise by the legislature of the police power, which will be
" noticed later), are infringements upon his fundamental rights of
" liberty, which are under constitutional protection" (pp. 106, 107).
The court considered whether the statute in question could be sus-
tained under the police power. It said, "under the mere guise of
" police regulations, personal rights and private property cannot be
" arbitrarily invaded, and the determination of the legislature is not
" final or conclusive. If it passes an act ostensibly for the public
" health, and thereby destroys or takes away the property of a
" citizen, or interferes with his personal liberty, then it is for the
" courts to scrutinize the act and see whether it really relates to and
" is convenient and appropriate to promote the public health. It
" matters not that the legislature may in the title to the act, or in

"its body, declare that it is intended for the improvement of the "public health. Such a declaration does not conclude the courts, "and they must yet determine the fact declared and enforce the "supreme law" (p. 110). The court then examined the statute in question and concluded that it was not a legitimate exercise of the police power. It said, "such legislation may invade one class of "rights to-day and another to-morrow, and if it can be sanctioned "under the constitution, while far removed in time we will not be "far away in practical statesmanship from those ages when govern-"mental prefects supervised the building of houses, the rearing of "cattle, the sowing of seed and the reaping of grain, and govern-"mental ordinances regulated the movements and labor of artisans, "the rate of wages, the price of food, the diet and clothing of the "people, and a large range of other affairs long since in all civilized "lands regarded as outside of governmental functions. Such gov-"ernmental interferences disturb the normal adjustments of the "social fabric, and usually derange the delicate and complicated "machinery of industry and cause a score of ills while attempting "the removal of one. When a health law is challenged in the "courts as unconstitutional on the ground that it arbitrarily inter-"feres with personal liberty and private property without due "process of law, the courts must be able to see that it has at least "in fact some relation to the public health, that the public health is "the end actually aimed at, and that it is appropriate and adapted "to that end. This we have not been able to see in this law, and "we must, therefore, pronounce it unconstitutional and void. In "reaching this conclusion we have not been unmindful that the "power which courts possess to condemn legislative acts which are "in conflict with the supreme law should be exercised with great "caution and even with reluctance. But as said by Chancellor "KENT (1 Com., 450): 'It is only by the free exercise of this "'power that courts of justice are enabled to repel assaults and to "'protect every part of the government and every member of the "'community from undue and destructive innovations upon their "'charter rights'" (pp. 114, 115).

In People vs. Marx, 99 N. Y., 377, the statute under considera-tion was an act prohibiting the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure un-adulterated milk or cream. The court held that this was unconsti-

tutional, inasmuch as the prohibition was not limited to unwholesome or simulated substitutes, but the act absolutely prohibited the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome, valuable or cheap it might be, and however openly and fairly the character of the substitute might be avowed and published. The statute was, therefore, contrary to the provisions, both of the Constitution of the State and of the United States, to the effect that no person shall be deprived of life, liberty or property without due process of law. The court said, "no proposition is now more firmly settled than "that it is one of the fundamental rights and privileges of every "American citizen to adopt and follow such lawful industrial pur- "suit, not injurious to the community, as he may see fit. * * "The term 'liberty,' as protected by the Constitution, is not "cramped into a mere freedom from physical restraint of the person "of the citizen, as by incarceration, but is deemed to embrace the "right of man to be free in the enjoyment of the faculties with "which he has been endowed by his Creator, subject only to such "restraints as are necessary for the common welfare" (p. 386). "Measures of this kind are dangerous even to their promoters. If "the argument of the respondent in support of the absolute power "of the legislature to prohibit one branch of industry for the pur- "pose of protecting another with which it competes can be sus- "tained, why could not the oleomargarine manufacturers, should "they obtain sufficient power to influence or control the legislative "councils, prohibit the manufacture or sale of dairy products? "Would arguments, then, be found wanting to demonstrate the in- "validity under the Constitution of such an act? The principle is "the same in both cases. The numbers engaged upon each side of "the controversy cannot influence the question here. Equal rights "to all are what are intended to be secured by the establishment of "constitutional limits to legislative power, and impartial tribunals "to enforce them" (p. 387).

In Colon vs. Lisk, 153 N. Y., 188, the general rules laid down by the above authorities have recently been restated. The court said, equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power (People vs. Marx, 99 N. Y., 377, 387). "Under the mere guise of acts to protect

Appendix.

"against fraud, the legislature cannot arbitrarily strike down "private rights, invade personal freedom or confiscate private "property. The police power must be exercised within its appro- "priate sphere and by appropriate methods" (People vs. Arensberg, 103 N. Y., 388, 399). This power "can be exercised only to "promote the public good, and (is) always subject to judicial "scrutiny" (Forster vs. Scott, 136 N. Y., 577, 584). "When the "legislature passes an act which plainly transcends the limits of "the police power of the state it is the duty of the judiciary to pro- "nounce its invalidity and to nullify the legislative attempt to "invade the citizens' rights" (People *ex rel.* Nechamcus vs. Warden, 144 N. Y., 529, 535). That power "must be exercised "subject to the provisions of both the Federal and State Constitu- "tions, and the law passed in the exercise of such power must tend "in a degree that is perceptible and clear towards the preservation "of the lives, the health, the morals or the welfare of the commu- "nity. * * The court must be enabled to see some clear and "real connection between the assumed purpose of the law and the "actual provisions thereof, and it must see that the latter do tend "in some plain and appreciable manner towards the accomplish- "ment of some of the objects for which the legislature may use this "power" (Health Department vs. Rector, 145 N. Y., 32, 39).

In People vs. Warren, 13 Misc., 615 (Superior Court of Buffalo, General Term, 1895), a statute made it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as a laborer thereon. The courts held that this was an unlawful interference with the liberty of the individual, as it violated the prohibition contained in both State and Federal Constitutions of depriving any person of life, liberty or property without due process of law.

In Godcharles vs. Wigeman, 113 Pa. St., 431, a statute prohibited the payment of laborers in orders upon stores in which the employers were interested. The court held that this was unconstitutional, as it was "an attempt * * by the legislature to do what, in "this country, cannot be done; that is, prevent persons who are *sui* "*juris* from making their own contracts" (p. 437).

In Waters vs. Wolf, 162 Pa. St., 153, a statute required the written consent of a subcontractor in order to bind him by a stipulation in a contract made between the original contractor and owner that no mechanics' lien should be filed. The court held that this

was unconstitutional because the right to acquire and possess property necessarily includes the right to make reasonable contracts for the improvement of property, and the contract that no mechanics' lien should be filed is not unreasonable as to either contractor or subcontractor.

In Palmer vs. Tingle, 45 Northeastern, 313, Supreme Court of Ohio, December 8, 1896, a mechanics' lien statute attempted to give a lien on property of the owner to sub-contractors, laborers and those who furnished machinery or material to the contractor. It was held that this was unconstitutional because all to whom the contractor became indebted were bound by the terms of the contract between him and the owner. The court said, "the usual and most frequent means of "acquiring property is by contract, and one of the most valuable "and sacred rights is the right to make and enforce contracts. "* * Contracts and compacts have been entered into between "men, tribes and nations during all time from the earliest dawn of "history; and the right and liberty of contract is one of the "inalienable rights of man, fully secured and protected by our "constitution, and it may be restrained only in so far as it is "necessary for the common welfare and the equal protection and "benefit of the people. That such restraint of the right and liberty "of contract is for the common, public welfare, and equal "protection and benefit of the people, must appear, not only to the "general assembly, in the face of popular clamor or the pressure "of the lobby, but also to the courts; and it must be so clear that a "court of justice, in the calm deliberation of its judgment, may be "able to see that such restraint is for the common welfare and "equal protection and benefit of the people" (p. 315).

In Kuhn vs. Common Council, 70 Mich., 534, a statute prohibited a dealer in liquor from becoming surety upon a liquor dealer's bond. This was held to be in violation of the constitutional principle that no person shall be deprived of life, liberty or property without due process of law and also of the Fourteenth Amendment to the Federal Constitution. The court said that "property does not consist merely of the title and possession. It "includes the right to make any legal use of it, and the right to "pledge or mortgage it, or to sell and transfer it. The right to "contract a debt or other personal obligation is included in the "right to liberty; and the right to contract a debt, or to enter

Appendix.

"into a bond or other writing obligatory, is also a right of prop-"erty" (p. 537).

In Spry Lumber Co. vs. Trust Co., 77 Michigan, 199, a mechanics' lien statute provided that persons who performed labor should have a lien upon the real estate notwithstanding the terms of any contract between the owner and the contractor. It was held that this was unconstitutional.

In Toledo Co. vs. Jacksonville, 67 Ill., 37, an ordinance required a railway company to keep a flagman by day and a lantern by night at a certain street crossing. It did not appear that this crossing was unusually dangerous. The court held that the ordinance was unconstitutional. It said that "it is not within the power of the "general assembly, under the pretense of exercising the police "power of the state, to enact laws not necessary to the preservation "of the health and safety of the community that will be oppressive "and burdensome upon the citizen. If it should prohibit that "which is harmless in itself, or command that to be done which "does not tend to promote the health, safety or welfare of society, "it would be an unauthorized exercise of power, and it would be "the duty of the courts to declare such legislation void" (p. 40).

In Frorer vs. People, 141 Ill., 171, a statute prohibited persons engaged in any mining or manufacturing business from keeping a "truck store" or being interested in or controlling any store for the furnishing of supplies, tools, clothing, provisions or groceries to their employees while so engaged in mining or manufacturing, and imposed a fine for any violation thereof. It was held that this was unconstitutional as an unauthorized limitation of the right to contract; that the police power is limited to enactments having reference to the comfort, safety and welfare of society and under its guise a person cannot be deprived of his constitutional rights. An adult person of sound mind laboring under any legal disability cannot be deprived of the right to make contracts in respect to labor or the acquisition of property under the pretense of giving such person protection.

In Ramsey vs. People, 142 Ill., 380, a statute required the owners and operators of coal mines, when the miner was paid on the basis of the amount of coal mined and delivered by him, to weigh the coal before it was screened and to pay on such weights. It was held that this was unconstitutional, because it was a depri-

vation, without due process of law, of the liberty and property right of making contracts.

In Ritchie vs. People, 155 Ill., 98, a statute prohibited the employment of females in any factory or workshop for more than eight hours a day. It was held that this was unconstitutional, as an arbitrary restriction upon the fundamental right of the citizen to control his or her own time or faculties, and the substitution of the legislative judgment for that of the employer and employee in a matter about which they were competent to agree with each other: that statutes must not conflict with the constitution, and where their ostensible object was to secure the public comfort, welfare or safety, they must appear to be adapted to that end, and cannot invade the rights of persons and property under the guise of a police regulation.

In Harding vs. People, 160 Ill., 459, a statute attempted to provide the manner in which coal should be weighed at the mines, and, in addition, that the miner should be paid only upon the basis of such weights. It was held that this was unconstitutional, because it deprived the miners, and those employing them, of the right to fix upon the weight of coal mined, or the amount due for mining the same, to their mutual satisfaction.

In State vs. Loomis, 115 Missouri, 307, a statute prohibited any person engaging in manufacturing or mining to issue, in payment of the wages of its employees, any order, check, memorandum, token or evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same was negotiable and redeemable at its face value in cash or in goods or supplies, at the option of the holder. It was held that this was unconstitutional, because it deprived the parties affected of their right to contract freely with each other.

In State vs. Julow, 129 Missouri, 163, a statute prohibited any employer from contracting with his employees to withdraw from any labor organization. It was held that this was unconstitutional, because it deprived the parties affected of their right to freely contract. The court said, "we deny the power of the legislature to do "this; to brand as an offense that which the constitution designates "and declares to be a right, and, therefore, an innocent act, and "consequently, we hold that the statute which professes to exert "such a power is nothing more nor less than a 'legislative judg-

Appendix.

" 'ment,' and an attempt to deprive all who are included within its " its terms of a constitutional right without due process of law " (p. 175).

In Low vs. Rees Printing Co., 41 Nebraska, 127, an act attempted to provide a rate of compensation to be paid for labor in excess of eight hours. It was held that this was unconstitutional, beause thereby the constitutional right of parties to contract with reference to compensation for services was denied.

In re Eight Hour Law, 21 Colo., 29, it was held that a bill prohibiting mining and manufacturing companies to contract with their employees for more than eight hours as a day's labor was in violation of the right of parties to make their own contracts. In House Bill No. 203, 21 Colo., 27, it was held that an act attempting to fix the manner of ascertaining the compensation for mining coal was unconstitutional.

In re Kuback, 85 California, 274, an ordinance made it a misdemeanor for any contractor to employ any person to work more than eight hours a day or to employ Chinese labor where the work was to be performed under any contract with the state. It was held that this was an infringement of the right of such persons to make and enforce their own contracts, and that the ordinance was not a valid exercise of the police power.

In State vs. Goodwill, 33 West Virginia, 179, a statute prohibited persons engaged in mining and manufacturing from issuing for payment of labor any order or paper excepts uch as was specified in the said act. It was held that this was unconstitutional, as it infringed upon the right to make contracts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 341.

THE UNITED STATES, COMPLAINANT,

vs.

THE JOINT TRAFFIC ASSOCIATION ET AL.

Points submitted by Mr. George F. Edmunds, of Counsel for the Pennsylvania Railroad Company.

STATEMENT.

The bill was filed January 9, 1896 (Rec., p. 45), alleging:

1. That the defendants were common carriers, engaged in interstate commerce. (F. 12.)

2. That on November 19, 1895, the defendants "unlawfully intending to restrain trade and commerce among the several States, and attempting to monopolize such trade and commerce, and intending to restrain

and prevent competition among the said railroads in respect to all the interstate trade and commerce hereinafter more particularly described, and contriving and intending unlawfully and unjustly to deprive the public engaged in such interstate trade and transportation of the facilities and advantages which the said public had theretofore enjoyed from the independent competition of said railroads, or any of them, in respect to the traffic hereinafter more particularly described, and intending to establish and maintain rates of freight and passenger transportation fixed arbitrarily, and uninfluenced by competition in respect to such traffic between the States and Territories of the United States, and between such States and Territories and foreign countries, entered into a certain unlawful contract, agreement, combination and conspiracy to restrain trade and commerce among the several States, in the form of a written document entitled, 'Articles of Organization with the Joint Traffic Association.'"

3. The contract is set out as a part of the bill. (Rec., p. 43 *et seq.*)

4. The bill alleged that the defendants were about to put the contract into execution, and prayed a decree declaring the contract null and void and enjoining the defendants from acting thereunder.

5. On March 9, 1896, the bill was amended by adding an allegation that the Interstate Commerce Commis-

sion on the 26th day of December, 1895, had notified the Attorney General that they considered the contract to be in conflict with the act to regulate commerce; and that thereupon the Attorney General directed the District Attorney to institute proceedings, etc. (Rec., pp. 48, 49.)

The answer of the Pennsylvania Railroad Company and its lines was filed March 23, 1896, and appears in the Record, pp. 169–184. It stated:

1. That the defendants were interstate carriers, existing under *State laws* and doing business among the States. (Pp. 169, 170.)

2. That the contract as set out *in hæc verba* in the bill was made in the form alleged.

3. That some of the defendants were competitors with others. (Pp. 170, 171, F. 510.)

4. That since the date of the making of the agreement, "continuously until the present time, such of said defendants as were previously engaged in competition have continued to be engaged in similar active competition, and to furnish to all persons engaged in such traffic and travel separate, independent, and competitive lines of transportation in respect thereto.

"They further aver that all of the said defendants parties to the said agreement intend to continue in like manner to be engaged in such competition and furnish-

ing of separate, independent, and competitive lines of transportation in respect to the traffic described in said bill.

"They further aver that all the companies parties to said agreement intend to conduct their business of transportation in accordance with the provisions of the Interstate Commerce Act, or any other law applicable to the premises, and in accordance with the provisions of their charters respectively, and to co-operate with the Interstate Commerce Commission to promote the observance of all lawful conditions."

5. That "said agreement was entered into by the parties thereto for the purposes therein recited, and for none other; that said agreement embodies truthfully, fully, and completely all the undertakings and agreements concerning the matters alleged in the bill into which said railway companies entered; that no other agreement in connection with the subject-matter was entered into by or between said companies; and that no purposes or intentions were entertained or sought to be furthered by said agreement or deducible therefrom, saving those in it recited." (F. 514.)

6. That they "deny all the averments in the bill of unlawful intent and of an intent to restrain trade and commerce among the several States and to monopolize the same." (F. 514.)

7. They deny specifically—

1. That said agreement was intended to restrain and prevent competition among the railroads in respect to interstate trade and commerce. (F. 515.)

2. That the railroad companies parties to said agreement intended to deprive the public engaged in interstate trade and transportation of the facilities and advantages which the public had theretofore enjoyed from their independent competition. (F. 515.)

3. That said companies intended to establish or maintain rates of freight and passenger transportation fixed arbitrarily, uninfluenced by competition. (F. 515.)

4. That said railroad companies entered into a combination or conspiracy to restrain trade and commerce among the several States. (F. 515.)

5. That said agreement was entered into in order to terminate competition amongst the parties thereto for freight and passenger traffic, or that it did terminate the same. (F. 516.)

6. That the parties to said agreement unlawfully, or in any way otherwise, pooled or combined any portion of their transportation or interstate commerce. (F. 516.)

7. That the parties to said agreement undertook to combine their freight or to divide their earnings or any portion thereof. (F. 516.)

8. They deny the allegations of the bill as to the nature of the agreement. (F. 517.)

9. They aver "that said agreement was not intended to, and did not, deprive the public engaged in interstate trade and transportation of any facilities and advantages which had been theretofore enjoyed by it from the independent competition of said railroads. They deny that said agreement was intended to or did establish or maintain rates of freight and passenger transportation fixed arbitrarily and uninfluenced by competition. They aver that on the contrary the rates of freight and passenger transportation by said agreement adopted were those which had been theretofore fixed by the various railroad companies and posted and filed with the Interstate Commerce Commission, and were reasonable and just, and so accepted. They deny that said agreement conferred upon the Board of Managers the powers in said bill averred, or any powers other than those stated therein. These defendants deny that said agreement made any surrender of competitive traffic to said Association, saving to the extent and in the way and manner therein set forth." (F. 518, 519.)

10. They admit that the agreement has been put in operation. (F. 520.)

11. They deny, "however, that they entertained or entertain any unlawful purpose, or that anything by

them intended to be done, or which will be done under and by virtue of said agreement, will operate to the detriment or disadvantage of the public, or will be in violation of the law of the United States." (F. 520.)

12. They deny intent to restrain reasonable and proper competition, and "aver that all such competition will be continued; that separate, independent and competitive lines of transportation will be maintained and operated as heretofore; and that said agreement will not in any wise interfere therewith." (F. 521.)

13. They aver that abolishing soliciting agencies, etc., will save $4,000,000 annually, and will produce "an advantageous result both to the companies and the shippers" (F. 522); and that it was an aid to the act to regulate commerce, and that its purpose was to prevent frauds on the act by "secret practices," etc., which produce "unjust discriminations between shippers" and "detriment to the public." (F. 523.)

14. They aver "that stable rates being reasonable and proper, are of benefit to the public, and that the cutting of rates below the standard of reason and justice is hurtful to shippers and the public." (F. 524.)

15. They aver "that by virtue of the agreement complained of the various parties thereto provided for the adoption in the first instance of rates which had been fixed upon because they were reasonable, and which have

been duly filed with the Interstate Commerce Commission." (F. 525.)

16. They aver "that the power conferred upon the Board of Managers to determine the division of rates and fares between the several railroad companies was not a power conferred on said Board to fix or determine rates for through traffic over competing lines; but only to fix and determine the pro-rata share or division of such established through rates or fares earned by the several railroad companies owning or operating the connecting railroads which constituted the respective through lines." (F. 530.)

17. They aver "that the object of the parties who entered into said agreement was to bring about a co-operation which would lead to the maintenance of reasonable and just rates, fares, rules and regulations of interstate traffic; would prevent unjust discrimination; would secure the reduction and concentration of agencies and the introduction of economies in the conduct of interstate commerce; would secure a stability and uniformity of rates which, as they are advised, was one of the leading purposes of the Interstate Commerce Act; and would insure a full, fair and honest carrying out of the purposes in said agreement set forth." (F. 531.)

The cause came to hearing on bill and answers. (F. 655, p. 219.)

The answer was in all respects strictly responsive; and even if it were not so, all its averments of fact must be taken as the true statement of the case.

POINTS.

I. The act of Congress in question is, in all its public aspects, a highly penal one in all its parts. It is true that section seven gives jurisdiction to the United States courts to entertain a proper suit in cases of personal injury; but the *right* to redress existed before.

The words of the act material to the present case are all contained in section one, which reads as follows:

"SECTION 1. Every contract, combination (in form of trust or otherwise), or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

II. The language of the section, in its just grammatical sense, covers only agreements that were void at common law.

The language is, "*every contract*," etc. Here there is no room for exclusion, exception, or limitation, unless it should appear (as in the case of the clergyman-laborer) that Congress could not have intended to violate common justice and common sense by applying the description to some particular case. The all-inclusive language describing the *actors* is then immediately changed in describing the *thing* that is declared illegal, and says, "in restraint of trade," etc. It does *not* say *any* restraint, as it should and would have done had Congress intended to describe the restraint in the same all-embracing words and sense employed in the specific and distributive antecedent; but, in simply saying "restraint of trade," it used an *integral phrase* descriptive of a *whole* as distinguished from a *partial*. Every kind of contract by every sort of person is one thing, while the description and definition of the thing forbidden to contract about is quite another. There was evidently an *industrious* use of the adjective "every" in describing the *contract*, and at the same time and in the same sentence an equally industrious omission to say, *any* restraint.

The philosophical and just reason for such a change of language in the same sentence is obvious. The first member of the sentence provided for the equality of *all* persons in making such contracts; — every one must fall under the same condemnation. The "syndicates of great capitalists" and the "unions" of "workingmen,"

and all the other endless combinations and sub-combinations of men, were put under the same sway of equal law. And is it too much to suppose that Congress and its committees understood the distinction, known at the common law and stated in the books, between "*general* restraint of trade" and "*partial* restraint," and that the general words, "restraint of trade," were used without the adjective "any" in the sense of the phrase being descriptive of what the common law condemned? Although a *whole* mathematically includes all its parts, when we speak of a whole descriptively of a subject that is to be supported and not restrained, we do not imply that no one of its parts must not be restrained from exercising a function that it can consistently with the operation of the whole. So if a particular contract does operate as a *partial* restraint of trade and is *moral* and useful, or not injurious to the general promotion of trade, it can not be justly held to be in restraint of trade. These two phrases, "general restraint of trade" and "partial restraint of trade," have been known and used distinctively and separately in the law for centuries. The following are some of the many authorities on the subject, and they are cited, where the quotations occur, in their own language.

Chitty on Contracts, Twelfth London Edition (1890), page 671, chapter XXI—"Of illegal, void and voidable contracts." This head of consideration includes every species of contract which the law will not enforce as

being against either a statute, morals, or public policy—restraint of marriage, interference with the course of justice, etc. In this category is arranged the subject in hand, "Impolicy: Restraint of Trade." He says, in the first paragraph: "On this principle any agreement by bond or otherwise in general restraint of trade is illegal and void." In the very next paragraph he says: "But an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable," etc.

I Pere Williams Rep., page 185. The court says: "All the books, when carefully examined, seem to concur in the distinction of restraint general and restraint particular," etc.

Story on Contracts (sections 674 and 675). The heading of the particular subject in hand precedes section 679, and is, "Contracts in Restraint of Trade." He opens section 679 as follows: "An agreement in *general* or *total* restraint of trade is void, although it be founded on a legal and valuable consideration." In section 680 he says: "But an agreement in partial restraint of trade," etc., "is valid."

It is certain that the distinct and qualifying descriptive word "any," correlative with the word "every" before "contract" in the first member of the sentence, was not placed as a prefix to the word "restraint" in the second member of the sentence. Why not? Is the word "restraint" more exact than the word "contract?"

The reverse is true. The purpose, therefore, was to leave the definition of the word "restraint" to the general principles and course of the common law.

But it may be asked why, then, did not Congress say so in the statute? The answer is, that if the words "restraint of trade as defined at common law" had been set forth, the doubt would at once have been raised whether this meant the common law of England at the time of the Revolution or now, or the common law of the several States, each of which may have its own, and which, as expounded, sometimes differs. To have introduced such a phrase would have created confusion and doubt instead of relieving it.

III. Every statute, whether penal or other, should be construed, if its language will possibly warrant it, in view of the mischief existing and the means of its cure, and either enlarged beyond its mere literalness or limited so as to remedy the existing wrong, and not interpreted so as to condemn what was before lawful and right. This proposition needs no authority or exposition, but I venture to refer to the following authorities, cited, where quotations occur, in their own language:

Endlich on the Interpretation of Statutes, chapter XI, section 295. "Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity,

hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence." And in that section and in section 296 he gives many instances where this principle was applied.

Sutherland on Statutory Construction, section 246. "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. General words or clauses may be restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language, construed in a broad sense, would lead to absurdity, it may be restrained. The particular inquiry is not what is the abstract force of the words, nor what they may comprehend, but in what sense they were intended to be used as they are found in the act."

Maxwell on the Interpretation of Statutes, Third London Edition (1896), page 26. "But it is another elementary rule, that a thing which is within the letter of the statute is not within the statute unless it be also within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. Language is rarely so free from ambiguity as to be incapable of being used in more than

one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many." Again, in chapter II, page 74, he gives the heading—"Words understood according to the subject-matter." "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, or even in its popular use, as in the subject or in the occasion on which they are used and the object to be obtained."

IV. What, then, were the existing or anticipated evils needing prevention, or condemnation, or punishment?

There were, it was seen or supposed, many combinations of so-called capitalists engaged in trade operating, as it was thought, injuriously to the safety and welfare of the United States. There were many combinations of so-called tradesmen and manufacturers, organized usually more firmly than combinations of capital had ever been or can be. There were numberless "unions" and "brotherhoods," etc., of handicraftsmen of every description, as well as similar organizations of "workingmen," all of which, in one way or another, affected commerce among the several States. The operations of most of them, carried on peacefully, doubtless aided and promoted the interstate commerce of the country—although probably

every one of them had in its laws and administrative provisions and conduct elements of a partial restraint upon the liberty of its members in respect of doing things within the range of interstate commerce that he might have freely and lawfully done if not a member. In such a state of things, was it either necessary or sensible to forbid the liberty of right conduct in order to prevent and punish wrong conduct? No nation and no State of the Union had thought it good for the welfare of its people to interfere with liberty of conduct further than was necessary to morality and the plain welfare of its people. The exercise of that personal liberty in the way of contract and trade that did not injure another or the State was hardly ever restricted, and when sometimes it was done, it was found that such restrictions were injurious to, rather than promotive of, the public welfare.

V. Congress is not empowered by the Constitution to determine finally what is for the public welfare. The end must be constitutional and the means constitutional and appropriate, as this court has often said. There can not be imputed to Congress, therefore, any intention to go beyond the long recognized boundary between contracts in general restraint of trade and contracts in partial restraint of it. The first clause falls within the category of those that are hurtful to the general good of society. This category is not condemned because of its

intrinsic immorality, etc., but because of its injurious effect on the rest of the community.

Where did Congress get the power to forbid the doing of acts by citizens that were moral and just, and which did not interfere with the general welfare? Congress had the power to regulate commerce; but it had no power to declare that commerce among the several States should not go on *at all*. It could so declare in respect of foreign nations, but in the exercise of an entirely different power from that to regulate commerce. It had no power to declare that no corn should come out of Nebraska or go into New York, or tobacco out of Virginia, or lumber or iron out of Michigan. Under the power to regulate commerce, it can lay no embargo either on persons or property between the States, where the character and condition of each is such as not to endanger the public.

VI. The language of the act should not be so interpreted as to overstep these limitations of power. I have shown that the specific and unambiguous words, "every contract," etc., include every species and variety of contract, etc., by whomsoever made. And I repeat, that a great number of executory contracts respecting trade among the several States do necessarily operate in partial restraint of trade, in that they prevent one party or the other from doing what he otherwise might have rightfully done in carrying on such interstate com-

merce. A contract to sell and ship all the waters of the Poland Spring in Maine to a purchaser in New York for one year, restrains the seller from trading in that water with a citizen of any other State. The same is true of every other innocent product of human industry. Innumerable instances and illustrations of this at once occur to the mind, and need not be stated.

Has Congress the power to prohibit such contracts?

The "restraint" mentioned in the act must, therefore, be held to mean that restraint which was, by the settled principles and judicial administration of law, vicious and injurious to society.

VII. It may be urged that these defendants, being corporations, can be dealt with by courts and the judiciary differently from other citizens.

This is denied, because:

(*a*) They are *State* corporations, having no other relations with the United States than the other citizens of their respective States engaged in interstate commerce.

(*b*) The act of Congress upon which this suit was brought makes no mention of or reference to corporations. They are embraced in the mass of citizens capable of making contracts.

(*c*) The Interstate Commerce Act makes no distinction between corporations and other citizens.

(*d*) Neither act could have done so without violating those principles of equality which are imbedded in the idea of justice and in the Constitution.

(*e*) A sovereign power may create corporations subject entirely to its will, but the sovereign power of the United States has not created any of these defendants, and therefore they could not be, and were not, dealt with in their character as such.

VIII. It has been suggested that Congress may have intended to forbid contracts that in any way partially restrain the liberty of the parties to trade, even if the contract were moral, reasonable, and beneficial to the public (as, for instance, a contract among bakers not to raise the price of bread), because of the difficulty of determining what was moral or reasonable or beneficial to the public, or the reverse. But all the history and experience of civilized States, from the beginning, involved the same difficulty, and, daily, over the civilized world courts of justice have been and are deciding this very class of questions. Within the range of subjects now under consideration, the judiciary is the only safe and constitutional depositary of such a power. A large share of the legislative efforts to decide such questions has proved to be disastrous.

IX. The agreement in question was, tested by the principles of the common law, valid.

(*a*) The record shows that it was *in fact* executed with pure motives and for honest and just business purposes, and in the belief that its operations would conduce to the public welfare; and in so far as it had been executed at the time of the filing of the answer, it appears that its practical execution, according to its terms, had been conducive to the public interest.

(*b*) It is perfectly true that a contract which does, on a just interpretation of it, provide for invading public policy, is void, even if made with innocent and patriotic purpose.

(*c*) But if the contract be of a character, on its face, which is so flexible or vague that it may be construed one way or the other, then the intent and purpose of the parties and their method of its execution are necessary elements of its character.

(*d*) If in such a case it is being executed in promotion of the public interest, it is good, because its construction and meaning have been found fairly consistent with the actual interpretation the parties have put upon it in its execution. But if the very same contract should be carried into execution by the parties in a manner injurious to the public interest, the judiciary should and would construe it to be vicious.

(*e*) Courts have no just right to make a contract criminal by construction when the conduct of the parties in executing it is promotive of public interest, if the contract itself can be fairly, or even possibly, construed as not criminal.

X. The agreement was not in *any* restraint of trade. On the contrary, it was an agreement of *constraint* on the parties to it to obey and execute the statute law relating to interstate commerce, and to promote that public policy which requires commercial equality and fair play.

It is assumed that these carriers are citizens, although associated as corporations, and not outlaws; and that they are entitled to the same liberty of trade and contract *pro re nata*, that the farmer, the merchant, and the workingman have.

(*a*) As between the parties to it, the preamble of the agreement is its key-note, and stands as a constitutional declaration of rights and duties. It gives the character and spirit in which its specific terms are to be read. It declares that the agreement is formed: "to aid in fulfilling the purposes of the Interstate Commerce Act; to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and interstate traffic; to prevent unjust discrimination, and to

secure the reduction and concentration of agencies, and the introduction of economies in the conduct of the freight and passenger service." (F. 50.) It is declared that the parties "make this agreement for the purpose of carrying out the objects above named." (F. 54, 55.)

If a controversy should arise between the parties as to a particular rate or other thing required of one of them, that party could defend himself in a judicial court by showing that the rate required of him was *not* "reasonable and just." He could stand on the solid ground that the agreement did not authorize any Board to fix an unreasonable or unjust rate. It is uniformly settled law that what is not reasonable and just in such cases is a judicial question, which, however difficult at times, the courts must determine.

(*b*) It follows that the specific provisions of the agreement must be read in the light of the preamble, unless a particular provision should be found clearly contradictory of it.

There is no such contradiction, or any inconsistency, between any of the provisions—all administrative—of the body of the agreement with the preamble.

(*c*) Carriers may lawfully and justly agree to combine to aid and promote trade and commerce. Such co-opera-

tive combinations (as the New York Clearing House, for instance) are many, and they promote and encourage the best interests of trade and commerce, and have even saved great business communities from financial disaster.

XI. Assuming the foregoing propositions to be true, it is confidently asserted that—

(*a.*) Article one of the agreement (F. 56) is not obnoxious either to law or morals. It is merely an adjustment of methods of management.

(*b.*) Article two: "The Association shall have jurisdiction over all competitive traffic." (F. 57.)

What kind of jurisdiction?

The agreement itself furnishes a definite answer: "For the purposes of carrying out the objects above named." (F. 54, 55.)

Those objects were—

1. To help enforce the Interstate Commerce Act.

2. To co-operate with each other to "establish and maintain reasonable and just rates."

3. "To prevent unjust discrimination."

4. To "secure the reduction and concentration of agencies."

5. The "introduction of economies." (F. 49, 50.)

This is the *jurisdiction* of the association and all of its members, and the whole of it.

Aiding to enforce the Interstate Commerce Act is not restraint of trade.

Co-operation to "establish and maintain reasonable and just rates" is co-operation to accomplish what the very words of the Interstate Commerce Act command carriers to do. Can any word in an act of Congress—short of literally saying so—be construed to make it a crime to agree to try to *obey* another act of Congress?

To "prevent unjust discrimination" is not any restraint of trade; but, on the contrary, is to purify and promote it.

To "secure the reduction and concentration of agencies" is not restraint of trade. No carrier is bound by law or morals to have any agencies at all; therefore, an agreement to abolish all of them is perfectly right and lawful.

If, for instance, the Post Office Department should withdraw all its agencies for the sale of stamps, it could not be said to have restrained the liberty of buying stamps.

The "introduction of economies" may be taken without comment.

These are the whole "head and front of our offending" if the specific detail of the agreement is not clearly inconsistent with the fundamental statement so set out in it.

This detail will now be considered article by article.

Article 1. (F. 56.) This is merely and solely organization, and needs no explanation or defense.

Article 2. (F. 57.) "SEC. 1. The association shall have jurisdiction over all competitive traffic." This is the jurisdiction, and only the jurisdiction, that the fundamental statement warrants. Like the jurisdiction of this court, and all courts, it is that which its constitution allows. It is not a grant of any arbitrary power.

Article 3. (F. 60–65.) This article provides that the presidents of the parties shall constitute the "Board of Control."

It provides, (1) for organization; (2) that it may fix salaries; (3) that it may select arbitrators; (4) that it may appoint an auditing committee; (5) that it may arrange for other railways becoming parties; (6) that it may consider appeals from the action of the Managers, and (7) that, until overruled by the Board, the decision of the Managers shall prevail. So far, there can be no pretense of restraint of trade.

Article 4 (F. 66) provides for the organization of the Board of Managers. This may be passed without comment.

Article 5. (F. 75.) This article provides (1) for organization, and (2) that the Managers shall construe the

agreement and resolutions adopted thereunder. This is merely saying that the construction adopted by the Managers shall stand and be followed consistently only with their acting within their jurisdiction in respect of the topics committed to them, and that the final rights and duties of the parties are not touched. (3) It provides that the applications for differentials and for changes of rates shall be made to the Managers. (4) It provides that their action, except as to rates and fares, shall be subject to appeal to the arbitrators. All this (except rates and fares) is mere administration, and does not touch any matter of restraint of trade. (5) It provides that their action as to rates and fares shall be subject to appeal to the Board of Control.

It will be seen that the powers of the Board of Control are not specifically defined, but they rest upon the fundamental statement, and so require the Board of Control, in adjusting rates and fares, to conform to what is "reasonable and just," as stated in the fifth paragraph of the preamble. (F. 49.)

Article 6 (F. 79), is merely administrative.

Article 7 (F. 80, 81), provides that "the duly published schedules of rates, fares and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate),

are hereby reaffirmed by the companies composing the association." It also provides that (F. 82, 83), "the Managers shall from time to time recommend such changes in said rates, fares, charges and rules as may be *reasonable and just* and necessary for governing the traffic covered by this agreement, and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made, shall be deemed a violation of this agreement. No company party hereto shall, through any of its officers or agents, deviate from or change the rates, fares, charges or rules herein reaffirmed or so recommended by the Managers, except by resolution of its Board. The action of such Board shall not effect the rates, fares, charges or rules disapproved, except to the extent of its interest therein over its own road."

The third section of the article (F. 85) provides that "the powers conferred upon the Managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the Managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

What can the severest, and even literal, criticism point out in these provisions that is in the slightest degree re-

straint of trade? They explicitly declare that the Managers shall recommend such changes in rates, fares, and charges as shall "be reasonable and just," and they explicitly declare that the powers of the Managers shall be so construed and exercised as not to permit any violation of the Interstate Commerce Act or any other law, and that they shall aid the Interstate Commerce Commission in every way to secure stability and uniformity in their rates, fares, and charges.

Is this agreeing to restrain trade? It is the very opposite. It is agreeing to so regulate the conduct of trade as to insure reasonableness and justice in precise conformity with law and with the public interest if, as we may assume, it is for the public interest that reasonableness, justice, and conformity to law shall prevail.

If an agreement were made between two or more carriers in the sole terms that each would carry on its operations "in true accordance with the Interstate Commerce Act in every particular," and that each should pay a heavy penalty for any breach, and that each must give thirty days' notice of non-conformity, would this be *any* restraint of trade? Surely not. And this agreement provides in detail for doing that very thing, and in some respects for doing more and better for the public by, for instance, providing for preserving to every line that share of business which both public interests and private fair-dealing should require.

If it be said that all these provisions were a disguise,

and intended to hide the real purposes of the association, the answer is that it is admitted in the Record that the purposes of the association were really what its preamble and these articles provide, and none other; and that, in the execution of the agreement, so far as it had gone down to the time of the answers being filed, there had been the same true fulfillment of the professed objects of the association.

Article 8. (F., 86, 87.) This article provides that "the Managers shall secure to each company equitable proportions of the competitive traffic covered by this agreement, so far as can be legally done." This is so obviously just that it would seem to need no explanation or comment. But it may be observed that its plain meaning is that each of the lines shall have its full share of the competitive traffic, and the public shall not be hampered or injured by any measures tending to prevent any one of the companies from doing its full duty to the public and having its fair share of business, thus keeping all the lines open and working to the fullest extent in aid of public business. An act of Congress uses the same phrase in providing for fair play in the adjustment of certain public operations. (Act of March 3, 1891.)

The second section of this article provides that the Managers (consistently with the agreement) "may determine the division of rates and fares between *connecting* companies, * * * keeping in view uniformity and

the equities involved." This provision is complained of in the ninth and eleventh assignments of errors as an agreement to divide proceeds and earnings, and as being in effect a pooling arrangement.

This contention is absolutely unfounded. It is only, as it declares in plain terms, an agreement in respect of the division of rates and fares "between *connecting* companies" (F. 89); that is, companies that form continuous lines of transportation of which each does its part, and the proportion of the whole sum earned for the common service to which each company is entitled shall be determined by the Managers. If, therefore, the provision means what it says it is obviously necessary and just, and in no sense restraint of trade or injurious to the public.

It is not needful to go through with the residue of the articles in detail. They are all (even including forfeitures and penalties, etc.) merely in support of the principal provisions which have already been stated, and which, if these principal provisions are lawful, are of no interest to the public or the court; and if these principal provisions are not lawful, it is, of course, unnecessary to discuss these following ones.

XII. But if it should be thought that these principal provisions are in "*partial* restraint of trade," it is submitted that they are such regulative provisions as are

not in "*general* restraint of trade," and do not injure the public interest, but in truth and effect promote it.

It is affirmed that the public interest in respect of carriers requires that their charges and all their conduct should be reasonable and just; and, therefore, that any agreement which does not violate this principle, but the rather supports it, is valid. The public is injured by the destruction of the business, or the bankruptcy of any line of railway or other means of communication between the various parts of the country, just as much as it is injured by excessive charges for transportation, or by agreements or contrivances by which any patron of these lines of communication is deprived of his fair equality with every other. To such ends it is lawful and right that carriers should co-operate. When in practice, either of agreement or action, they undertake to defeat these ends, they are and ought to be punished. Until they do so, they ought to be encouraged in honest and just co-operation, rather than vexed and harrassed in their efforts.

XIII. Attention is now called to the principal and clear distinctions between some of the crucial parts of the trans-Missouri contract and the agreement set forth in this Record.

1. The Missouri agreement (found in full on page 62 of the trans-Missouri Record) declares itself to be "for

the purpose of *mutual protection* by establishing and maintaining reasonable rates," etc.

The agreement here in question declares itself to be "to aid in fulfilling the purposes of the Interstate Commerce Act," and to "co-operate with each other to establish and maintain reasonable and just rates," and to "prevent unjust discrimination," and to economize. So far as purposes declared in a contract can have effect upon its meaning, the distinction between the two is broad and obvious. The first is purely and avowedly to take care of themselves, and nobody else. The second is for the purpose of doing what a strict and wholesome law required, and to co-operate in the establishment of reasonable and *just* rates, and to prevent unjust discrimination, etc. These radical differences need not be enlarged upon.

2. Article two of the Missouri contract authorizes a committee to establish rates, etc., with really no provision for anything substantial, other than against *reductions* of rates (see section 5). The agreement in this Record adopted the rates already settled by complete competition, and filed with and approved, inferentially, by the Interstate Commerce Commission; and the power to change rates was a power to change them *downward* as well as upward.

3. The trans-Missouri contract (article 2, section 8) provided for penalties against any member "who shall

reduce any rate." No such characteristic exists in the present agreement.

4. The trans-Missouri contract (article 2, section 8) forbids any agreement to be made with any shipper "to secure a reduction" of rates, etc. There is no such provision in the present agreement; but, on the contrary, the Board of Directors of each road has the express right to deviate from and change the rates recommended by the Managers, so far as the interest of its own road therein is concerned. (F. 83.) This provision gives explicit and express authority, as a part of the very agreement itself, to each one of the parties to manage its own interests in these respects absolutely. There is, therefore, reserved to each road absolute independence and liberty of action in respect of itself. It can stand alone at any moment of time. All it is required to do is to give thirty days' notice of any such action. The interstate commerce law requires notice to be given by railways of changes of rates, and it can not be illegal for carriers to agree that they will thus notify each other. It may be said that the notice required is too long. This is denied. The vast interests of commerce in the hands of producers, manufacturers, and traders require, far more than the interests of any carrier, that such changes shall not take place hastily in either direction.

5. The third section of the eighth article of the agreement in this case (which has already been cited in

another connection) positively requires the Managers to act, and limits their powers, so that nothing shall be done in violation of the Interstate Commerce Act, or any other law, etc. There is no such clause in the trans-Missouri agreement.

6. There is also in the contract in this case a distinct requirement that the Managers shall co-operate with the Interstate Commerce Commission in carrying out the law. No such provision is found in the trans-Missouri contract.

7. The trans-Missouri bill alleged as a fact that the parties to that agreement had refused to establish or give to their customers rates based on cost of construction, etc., and cost of operation, and other just elements of the problem. The answer in that case evaded this allegation by merely denying "that *by reason* of said agreement," or under duress of fine, etc., it had "refused to establish and maintain just and reasonable rates," thus plainly admitting that it had been guilty of the accusation in the bill; but that it had not refused to give reasonable rates, etc., *because* it was bound by the agreement. There is no such allegation in the bill in this case, while the answers allege continued practical reasonableness and justice, and continued competition.

XIV. The only claim made in the assignment of errors, that the agreement violates the Interstate Com-

merce Act (and the only claim possible), is that of the ninth, eleventh, and thirteenth assignments, which are all based solely on a supposed violation of section five, against pooling and division of earnings. This proposition has already been referred to and explained as applying only to the division of earnings by connecting roads forming a continuous line in reference to the provisions of section two or article nine. (F. 89.)

It may be claimed that article eight of the agreement is obnoxious to section five of the Interstate Commerce Act. This article is as follows: "The Managers are charged with the duty of securing to each party hereto equitable proportions of the competitive traffic covered by this agreement, so far as can be legally done." It does not provide for anything in respect of profits or earnings, but provides that the Managers, as far as they legally can, shall try to secure to each one of the roads its *equitable* (that is, just and right in every respect, public and private) proportions of the competitive traffic. This is not pooling, nor in the nature of pooling, but the very reverse. It requires just what the declared object of the contract was, that each company shall do its whole duty to the public, and have its just share of the business, and that the other companies shall not despoil it of its rights as it regards itself, or drive it out of its performance of the duties it owes to the public. Could anything be more just than this, if the public interest in keeping all lines alive and doing their proper service is to be subserved?

The foregoing points and suggestions are submitted with all deference, and with the greatest respect for what this court has said in another case. And it is felt to be certain that the court will gladly review the subject in the light of facts appearing in *this* Record, and in respect of which all parties to it are now before the court.

GEO. F. EDMUNDS.

No. 341. C

Brief o

Supren

UN

THE JC

Brief on b
Allegher
Wilming
Haute
Rapids
tral Rai
Pittsbur
Compan
Compan

FEB 17 189
JAMES H. McKENNE
CL

No. 341. October Term, 1897.

Brief of Johnson for Appellee.

IN THE

Supreme Court of the United States.

Filed Feb. 17, 1898.

UNITED STATES, COMPLAINANT,

vs.

THE JOINT TRAFFIC ASSOCIATION *ET AL.*

Brief on behalf of the Pennsylvania Railroad Company, the Allegheny Valley Railway Company, the Philadelphia, Wilmington and Baltimore Railroad Company, the Terre Haute and Indianapolis Railroad Company, the Grand Rapids and Indiana Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and the Toledo, Peoria, and Western Railway Company.

JAMES A. LOGAN,
JOHN G. JOHNSON,
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

United States, Complainant,

vs.

The Joint Traffic Association et al.

October Term, 1897.

No. 341.

BRIEF ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY AND OF THE COMPANIES WHO JOINED WITH IT IN THE SAME ANSWER.

Preliminarily, we suggest that the relief demanded by the United States, to the full extent of its claim, cannot be granted, under any possible view of the case, which can be taken. The bill prays for a decree—

"That the said agreement is unlawful, null, and void, and that the defendants, and each and every of them, and their officers, agents, and servants, and each and every of them, be enjoined perpetually from continuing in the combination or association established by the said agreement, and from acting or in any way operating their roads thereunder, either in respect to the provisions of said agreement, by which all the competitive traffic therein described is surrendered to a board of managers, to be divided by said managers among the several companies parties to the agreement, or in respect to the establishment of rates, fares, and charges by said board of managers, or in respect to the division among the several companies parties to said agreement, by said board of managers, of the said rates, fares, and charges for the transportation of the freight and passenger traffic within the scope of said agreement, or in any other respect whatever."

We will endeavor, later, to show there is illegality in none of the purposes of the agreement; but, we doubt not, it will be conceded that most of them are legal. Hereafter, at some

length, we will discuss all the purposes of the agreement; but, in connection with the immediate point with which we are dealing, it is sufficient to recite them.

They are:—

"To aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service."

The United States will hardly contend it was not competent for the railroad companies to enter into an agreement for many of the purposes above stated. Even if this court shall hold that some of them are illegal, it will not do what is prayed by the bill, viz., declare the agreement to be "unlawful, null, and void," nor enjoin the members "from continuing in the combination or association established by the said agreement," nor "from acting or in any way operating their roads thereunder in any respect whatever."

Whilst, if convinced that some of the objects are unlawful, this court will so decree, it will not destroy the association itself nor interfere with such of its purposes as are legal Having made this preliminary suggestion, we will seek to show that no part of the agreement is illegal, but that the association was validly formed for all the purposes enumerated therein.

It is not the intention of this brief in any way to discuss the points so elaborately considered in the opinions filed in the Trans-Missouri case by Mr. Justice Peckham, speaking for the majority of the court, and by Mr. Justice White, speaking for the minority. Further discussion of these vexed questions is left to others.

For the purposes of this argument we will assume it has been forever settled (1) that railroad companies are within the Anti-Trust Act, and (2) that every contract in restraint of trade is by it prohibited.

We maintain that the agreement in the Trans-Missouri case was radically different in most important particulars from that

under which the Joint Traffic Association exists. In the former case there was a combination, for "mutual protection," of companies which agreed, by joint action, to do what, in the arguments addressed to this court by the counsel for the railroad companies, seems to have been admitted to have amounted to a restraint of trade, viz., to establish, and, after establishment, to maintain, rates binding upon all. In the present case the main purpose of the agreement is not to restrain trade, but to bring about certain economies in the expenses of transportation and to prevent the doing of what is condemned as illegal by the Interstate Commerce Act, viz., the making changes in rates either secretly or without proper notice.

Whilst the Anti-Trust Act condemns as illegal, as this court has held, all combinations really in restraint of trade, it does not condemn associations having for their object the prevention of acts made illegal by the Interstate Commerce Act.

There is an obvious distinction between an agreement in restraint of trade and an agreement preventing the doing of what illegally interferes with trade.

Mr. Justice Peckham, speaking for this court, in holding the Trans-Missouri contract illegal, says:—

"Does the agreement restrain trade or commerce in any way so as to be a violation of the Act? We have no doubt that it does. The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local.' To that end the association is formed and a body created, which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force, and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the Act.

"For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it."

In the Trans-Missouri case there was an agreement by several carriers, who combined for their "mutual protection," which delegated the duty imposed upon each to a committee acting for all. It seems to have been admitted by the counsel for the railroad companies in that case that this amounted to a restraint of trade, although they then contended that what they admitted to be in restraint was reasonable and proper.

We urge, preliminarily, in the present case, that the Government must stand upon the agreement as it is written. It is entitled to nothing by virtue of the innuendos and averments of its bill. These were all denied in the answer, as is evident from the following summarization:—

The Pennsylvania Railroad Company and the lines associating with it admitted the execution of the agreement attached to the complaint; that they were common carriers engaged in the transportation of freight and passengers; that they had been and were engaged in active competition, furnishing separate and independent competitive lines of transportation; that they intended to continue; and that they had observed, and intended to observe, the provisions of the Interstate Commerce Act and other laws applicable, and to cooperate with the Interstate Commerce Commission in promoting the observance of the lawful conditions.

In the fourth, fifth, and sixth paragraphs of their answer they said:—

"IV. These defendants admit that on or about the nineteenth day of November, 1895, all the railroad and railway corporations, parties defendant in said bill named, did enter into the agreement, of which a copy, marked 'Exhibit A,' is attached thereto. They aver that said agreement was entered into by the parties thereto for the purposes therein recited, and for none other; that said agreement embodies truthfully, fully, and completely all the undertakings and agreements concerning the matters alleged in the bill into which said railway companies entered; that no other agreement in connection with the subject matter was entered into by or between said companies; and that no purposes or intentions were entertained, or sought to be furthered, by said agreement or deducible therefrom saving those in it recited. These defendants deny all the averments in the bill of unlawful intent, and of an intent to restrain trade and commerce among the several States, and to monopolize the same.

"They were advised by counsel before the making thereof, and still are advised and therefore aver, that the intent and scope of said agreement, and of the parties who made it, was, and is, lawful.

"V. These defendants deny the following specific averments of the bill:—

"1. That said agreement was intended to restrain and prevent competition among the railroads in respect to interstate trade and commerce.

"2. That the railroad companies, parties to said agreement, intended to deprive the public engaged in interstate trade and transportation of the facilities and advantages which the public had theretofore enjoyed from their independent competition.

"3. That said companies intended to establish or maintain rates of freight and passenger transportation fixed arbitrarily, uninfluenced by competition.

"4. That said railroad companies entered into a combination or conspiracy to restrain trade and commerce among the several States.

"5. That said agreement was entered into in order to terminate competition amongst the parties thereto for freight and passenger traffic, and that it did terminate the same.

"6. That the parties to said agreement unlawfully, or in any way otherwise, pooled or combined any portion of their transportation of interstate commerce.

"7. That the parties to said agreement undertook to combine their freight or to divide their earnings, or any portion thereof.

"VI. These defendants deny all the allegations in said bill contained of terms or conditions of said agreement of the 19th of November, 1895, other than those in said agreement contained. They aver that said agreement was the only one entered into by said railroad companies concerning its subject matter, and plead the terms, and the plain meaning thereof, in contradiction of the averments of said bill, that there was some other agreement, and that the agreement entered into was made with any intent or for any purpose not expressed therein."

In the seventh, eighth, ninth, and tenth paragraphs they denied specifically every other material allegation of the Government's complaint, and explained that the action and purposes were consistent with the due observance of the law. In the tenth paragraph they set out the desirability of reasonable rates, and of uniformity and stability therein, to the public. In the eleventh paragraph they averred the continuance of the rates as established by tariffs then on file, and the provision of a method by which, from time to time, they could be modified with due regard to the interests of all concerned, reserving to the boards of directors lawful power to control the

rates to be charged in the future. In the twelfth paragraph they averred that the provisions of the agreement for the termination of through co-operative and commission freight lines resulted solely from the desire to secure economies beneficial to the companies, uniformity and equality in the facilities for transportation, &c. In the thirteenth paragraph they averred that no power was conferred on the board of managers to determine rates for through traffic over competing lines, but only to fix and determine the division of such established rates, &c., earned by the railroad companies which constitute the through lines. In the fourteenth and fifteenth paragraphs they averred that the object of the agreement was to maintain reasonable and just rates, &c., to prevent unjust discrimination, to secure the introduction of economies, and stability and uniformity of rates, which was one of the leading purposes of the Interstate Commerce Act; and that the purposes of the Interstate Commerce Act would be promoted by the carrying out of the agreement. In paragraph 16 they set forth that under the Act to Regulate Commerce they are obliged to conform to its requirements in the matter of publication, posting, filing of schedules, changing of same, establishment of just and reasonable rates, &c., and that concerted action between the carriers is indispensable to the securing of such conformity. In paragraph 17 they denied the existence of the necessary prerequisite action by the Interstate Commerce Commission, or of any request by it that the District Attorney shall institute proceedings. They claimed, therefore, that the proceedings had not been legally instituted. In paragraph 18 they denied that they were engaged in trade or commerce among the several States, or that the agreement, or anything to be accomplished thereunder or to result therefrom, was within the purview of the Anti-Trust Act. In paragraph 19 they denied the right to unite in the same bill causes of action originating by request of the Interstate Commerce Commission under the Interstate Commerce Act and causes of action originating by request of the Attorney-General under the Anti-Trust Act. In answer to the amendment of the Government's bill, they denied, in substance, that the proceedings

set forth in said amendment had been legally sufficient to warrant the institution, maintenance, or prosecution of this suit.

Whilst we concede that if the agreement be illegal it cannot be cured by averments in our answer, we submit that under those averments there can be no condemnation of the agreement unless either it discloses an illegal purpose, or unless it provides illegal means for carrying out a legal one.

In the Trans-Missouri case, the bill was not filed until nearly three years after the agreement had gone into execution. It abounded with complaints of the manner in which the latter had been carried out, as appears by the following extract from the statement of allegations of the bill found in the report of the case at page 299, 166 United States Reports:—

"It was further alleged that the agreement went into effect on the first day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroads the rules and regulations and rates and prices for moving, carrying, and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroad rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and the people of the States and Territories subject to said association, and all persons engaged in trade and commerce within, among, and between the different States and Territories, had been compelled to and were still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association, and ever since that date had been and still were deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and were deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned, and that the trade, traffic, and commerce in such region of country, and the freight traffic in connection therewith, had been and were monopolized and restrained, hindered, injured, and retarded by the defendants by means of and through the instrumentality of such association."

In the present case, it was provided the agreement should not go into operation until the first day of January, 1896,

although it bore date the 19th November, 1895, and had been filed on the twenty-fourth day of December, 1895, with the Interstate Commerce Commission. In pursuance of an intimation received by the United States Attorney for the Southern District of New York prior to the first day of January, 1896, the bill was filed on the eighth day of January, 1896. No action under the agreement, therefore, had been taken antecedently to the filing of the bill, and the case for the Government rests alone upon the alleged invalidity of the same.

In this connection it is not inapt to say that although our agreement by its express provisions went into operation on the 1st of January, 1896, and has been in operation since for a period of more than two years, no word of complaint of injury to shippers or others has come from the United States Government, or from the public through the press or otherwise.

The differing purposes of the two agreements will be best shown by putting what is expressed in each concerning the same in immediate juxtaposition.

In the Trans-Missouri case, as we have seen, the intent expressed was for "mutual protection," to "establish and maintain * * * rates," &c., * * * "on all freight traffic, both through and local." The agreement further provided for the appointment, not with a view to making effectual the provisions of the Interstate Commerce Act, but simply for "mutual protection," of a committee—

> "To establish rates, rules, and regulations on the traffic subject to this association and to consider changes therein, and to make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ, the question at issue shall be referred to the managers of the lines, parties hereto, and if they disagree it shall be arbitrated in the manner provided in Article VII."

In the present agreement, four purposes are declared. Two of these, as we will endeavor to show, are legal and praiseworthy. The third is the one which led, mainly, to the passage of the Interstate Commerce Act. The fourth, though stated generally to be the establishment and maintenance of rates, is limited, by the provisions of the contract, to a main-

tenance of rates established in accordance with law, not by all, in co-operation, but by each, acting alone.

The present agreement thus expresses its purpose:—

"To aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service."

By Article VII., which deals with "rates, fares, charges, and rules," it is provided:—

"SECTION 1. The duly published schedules of rates, fares, and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), are hereby re-affirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges and the rules applicable thereto.

"SEC. 2. The managers shall, from time to time, recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement. No company party hereto shall through any of its officers or agents deviate from or change the rates, fares, charges, or rules herein re-affirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.

"SEC. 3. The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

The purposes of the present agreement must, under the pleadings, be conclusively taken to be those therein stated. If they do not restrain trade the agreement cannot be held illegal unless, despite the failure so to announce, it provides for the doing of something beyond the purposes expressed. An examination of the agreement, however, establishes the fact that it does not thus provide. The sole question to be determined, therefore, is whether any of its purposes expressed are in restraint of trade.

Two of these purposes are the securing "a reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." It would be a waste of time to endeavor to support the self-evident proposition that these purposes are legal. It is the right and the duty of every transportation company to adopt economies in the way of reduction and concentration of agencies and otherwise. These economies may be adopted solely by its own action, or, if they can be more efficaciously secured in conjunction with others, they may be adopted in concert with them.

Another purpose of the agreement, viz., "fulfilling the purposes of the Interstate Commerce Act" and preventing "unjust discrimination," is, of course, unobjectionable. The main object of the Interstate Commerce Act was "to prevent unjust discrimination." It can scarcely be contended, therefore, that an agreement having for its end the prevention of a discrimination which, because of its hampering trade, was by said Act made illegal, is "in restraint of trade."

We do not deem it necessary to consider the co-operating "with each other and adjacent transportation associations," because such co-operation, apart from the method thereof, is harmless.

Though the remaining purpose of the agreement is said to be "to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic," this must be read in connection with what is provided as to the method of establishment and maintenance.

In the Trans-Missouri contract there was no context control-

ling the expressed purpose of "mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." It provided for the establishment of these rates, not by each of the companies who were parties to the agreement, but by a committee to be created "to establish the rates, rules, and regulations on traffic subject to this association, and to consider changes therein." The directors of the signing companies were deprived of the power to establish rates, which was vested in a foreign body appointed by the combined companies. The purpose of the agreement was to confer upon such foreign body the power to establish rates which it was agreed, after establishment, should be maintained. It was entered into, not for the enforcement of the Interstate Commerce Act, but solely for the "mutual protection" of carriers by maintaining rates to be jointly thereafter established.

Under the present agreement, the rates agreed to be maintained until changed can be established by no body other than the board of directors of each of the several signing companies. At the time of its execution the rates had been established by each of the companies which entered into it and had been duly filed, in accordance with law, with the Interstate Commerce Commission. This establishment, therefore, had resulted from the voluntary action of the respective boards of directors, acting in accordance with law, in pursuance of their respective corporate duties. The rates thus established could not, under the Interstate Commerce law, be changed until after the filing with the Commission of new schedules by way of substitution. Without such filing of new rates, any departure from the old ones would be in violation of law.

It can hardly be contended that an agreement by the signing companies that rates theretofore voluntarily and properly established by each, and duly filed by each, should be maintained until other rates should be voluntarily and legally established and filed, is in restraint of trade so long as an Act of Congress which demands such maintenance shall continue in force. The object of the agreement was to provide machinery

which would secure that maintenance by the companies of the rates which, by the law, were made obligatory until notice. It sought, not to prevent transportation generally, but transportation in an illegal way at illegal rates.

It is true the managers are authorized from time to time to "recommend" such changes in the rates, fares, and charges, previously established by the independent action of the various companies "as may be reasonable, just, and necessary for governing the traffic covered by this agreement," &c., but the directors of each company are left free "to the extent of its interest therein over its own road," by resolution, to "deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers."

The rates, therefore, under the present agreement, unlike those in the Trans-Missouri case, where they were fixed by a foreign body, are those established by each company. There is no requirement of conformity to the changes which may be recommended by the managers. The directors of each company are left free to make changes in the rates theretofore established by them.

In order that we may give to the United States the full benefit of its contention that the rates are to be prescribed by the managers rather than by the railroad companies, we quote the whole of section 2 of Article VII., which reads:—

"SEC. 2. The managers shall from time to time recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement. No company party hereto shall through any of its officers or agents deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto."

Whilst the first sentence of this section, taken by itself, without its context, might superficially indicate that the recommendations by the managers are to become instantly binding upon all the members of the association, and that being thus binding they cannot be changed until after a resolution by the board of directors, which can become effective only after thirty days' notice, it will be observed that no power is conferred upon the managers to make changes. What is conferred upon them is the right to "recommend" changes. There is a vast difference between a power to "recommend" and a power to "change." A recommendation, in order that it shall become operative, necessarily requires something further to be done, inasmuch as it does not, by itself, effect a change, but merely suggests one. Whilst we have the words, "and the failure to observe such recommendations," &c., "shall be deemed a violation," &c., we can only gather the real intent by reading the whole provision. Certainly a power is reserved to the respective boards of directors to disapprove. The fair construction of the first sentence of the second section is, that the non-observance only of such recommendations as shall be approved, shall amount to a violation of the agreement.

The proper interpretation of the sentence reading, "a copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective," &c., is, that where a change is made of rates originally established or previously recommended and approved, there must be a delay of thirty days, pending notice, before such change shall become effective. Reading it as a whole, as providing for a recommendation by managers and for an approval or disapproval by the respective boards of directors, we find the power reserved to each board to refuse to be bound by rates not by itself established. The second section, therefore, if it stood alone, fairly read, would not warrant the interpretation that the recommendations of the managers of the association become instantly binding. It must be read, however, in

connection with the immediately following third section, which runs thus:—

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto."

The third section makes clear the true meaning of the second, and subjects the powers of the managers of the association to establish rates which, prior to their approval by them, can bind any of the boards of directors to the Interstate Commerce Act and "to all other laws applicable to the subject matter."

No company can be held to have violated the agreement so so as to subject itself to forfeitures thereunder, unless it really has violated it. If it be impossible for the managers *legally* to change rates, without the approval of each board, no changes can be made without such approval, because to direct them would be violative of law. No forfeitures, under the agreement, can be enforced for a refusal to comply with changes not legally made.

Whilst it is true that if the directors of any signing company desire to make changes they can only do so "effectively" after the expiration of thirty days from the receipt of their resolution by the managers, it does not follow that because of the time thus allowed there is a restraint of trade. The Interstate Commerce Act deprives every railroad company of the power to make *instantly* effective, changes in its rates. These can only be made "effectively" after the expiration of a specified time. Preliminary notice is required as a preventative against discrimination through changes unexpectedly made, communicated to one set of shippers and withheld from others. A reasonable notice does not restrain, but promotes, trade. Will this court say that the requirement of thirty days' notice of a change does not aid in the prevention of discrimination, by giving all shippers sufficient warning to make their arrangements accord?

The practical working of the Interstate Commerce Act developed the fact that the time fixed for notice of proposed advances and reduction of rates was too short. What is

known as the "Patterson Bill," being H. R. 3837, was reported, about January, 1896, by a committee for printing. It is understood that in the matter of extended time of notice of changes it embodied a suggestion by some at least of the members of the Commission. In that bill it was proposed that thirty, instead of ten, days' notice of the advances of rates should be given, and that twenty, instead of three, days' notice of reduction thereof should be given. The suggestions under this head will appear from the following quotation from the bill, which will be read with the understanding that the parts between brackets were proposed to be stricken out, and the words printed in small capitals inserted, and also that, with the exception of the words in small capitals, it consists of a quotation from the present law:—

"No advance shall be made in the rates, fares, and charges which have been established and published [as aforesaid] by any SUCH common carrier [in compliance with the requirements of this section] except after [ten] THIRTY days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such public rates, fares, or charges shall only be made after [three] TWENTY days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

"[And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section,]

"It shall be unlawful for [such] ANY common carrier SUBJECT TO THE PROVISIONS OF THIS ACT to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force. * * *

"No advance shall be made in joint rates, fares, and charges shown upon joint tariffs except after [ten] THIRTY days' notice to the Commission which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges except after [three] TWENTY days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or

such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time."

An agreement providing for numerous clearly legal purposes, having for its main purpose the prevention of violations of the Interstate Commerce Act, should not be held illegal, simply because it requires that notice of changes in filed schedule rates shall be given for a length of time sufficient to prevent one set of shippers, through early information, from profiting at the expense of another set.

The requirements of *some* notice of changes in rates is promotive, not restrictive, of trade. There can therefore be no condemnation of the provisions of the present agreement, requiring notice of changes in established rates. If there be any just objection to this provision, it must be on account of the notice prescribed being unreasonably long. There being no averment in the bill of such unreasonableness, this court cannot assume it.

Even if it be held that the requirement of thirty days' notice of changes by the various boards of directors is improper, the agreement will not thereby be rendered illegal; the provision for thirty days' notice alone will fail. A contract which provides merely for the doing of one act must fail, if the act itself be declared illegal by reason of the failure of all reason for its continued existence. A contract, however, to do various things which are performable, will not fail because of provision, *inter alia*, for an act which cannot legally be performed, if it be provided that nothing illegal shall be done thereunder. In such event the contract will stand and the illegal provision will fall.

To bring the present contract within the inhibition of the Anti-Trust Act, it will be necessary to hold that an agreement

to do what is required by the Interstate Commerce Act, viz., to maintain filed schedule rates, restrains trade because of a provision that thirty days' notice of changes in rates shall be given.

In the Trans-Missouri case, the directors of each company were deprived of their power to establish and change rates. Under the present agreement, the directors may change the rates theretofore established by them, with no other restriction saving that the change shall be accompanied by what is deemed necessary notice.

To strike down this agreement, this court must hold the managers to be possessed of an illegal power, although it expressly provides by Article VII., section 3, that no powers are conferred, or shall be exercised, which are violative of law, or of the charter provisions of the signing companies. The powers of the managers are so limited that they are not to be construed as to permit the doing of anything in violation "of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto."

The managers, under the present agreement, are compelled to "co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

Can managers thus forbidden to exercise powers violative of the law, or of the charter requirements of the signing companies, do aught which will be in restraint of trade, especially in view of their duty so to co-operate with the tribunal to which the law has delegated the duty of securing stability and uniformity in rates, fares, and charges, as to bring about such stability and uniformity? It will be observed that the "uniformity" sought to be obtained is the "uniformity" which it is the duty of the Interstate Commerce Commission to secure, viz., "uniformity" of charge by each company to all its shippers under like circumstances.

JOHN G. JOHNSON,
JAMES A. LOGAN,
Of Counsel.

FILED,
FEB 18 1898
JAMES H. McKENNEY,

Brief of Phelps for Appellee

Filed Feb. 18, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 341.

THE UNITED STATES, COMPLAINANT-APPELLANT,

vs.

THE JOINT TRAFFIC ASSOCIATION AND OTHERS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the New York Central and Hudson River Railroad Company, one of the Defendants.

E. J. PHELPS,
Of Counsel.



Supreme Court of the United States,

OCTOBER TERM, 1897.

THE UNITED STATES, Appellant, vs. THE JOINT TRAFFIC ASSOCIATION and others.	No. 341.

Brief for the New York Central and Hudson River Railroad Company, one of the defendants in error.

Statement.

This case stands upon bill and answers, the answers not being traversed.

The defendants in error are thirty-one railroad companies, whose names will be found in the record, (*page* 1).

The Joint Traffic Association, named as a defendant, is a voluntary association of the other defendants, formed under the articles of organization hereinafter mentioned, not incorporated, and not capable of being a party to a suit.

The bill charges in substance, that the defendants on the 19th November, 1895, organized themselves into an association by an agreement in writing of

that date (hereinafter called the Agreement), severally executed by each of them for purposes therein mentioned, having its principal place of business in the City of New York, and elected the various officers required by said articles. That they are preparing to put into full operation the provisions of the Agreement, and are holding meetings for that purpose. That the defendants were prior to the Agreement common carriers of freight and passengers on their respective lines, between various States and Territories, and in open and active competition with each other. And that the Agreement, a copy of which is annexed to the bill, is an unlawful agreement in restraint of trade and commerce, and intended to terminate competition between the parties to it by unlawfully pooling or combining their business, and attempting to monopolize a part thereof, and by conferring upon the managers of the association power to establish rates, fares and charges for such business, and to determine, when in their judgment necessary, the division thereof among the members.

The prayer is that the defendants be enjoined from continuing in the Agreement, and from operating their roads thereunder, or in respect to any of the provisions thereof. (*Record, pp.* 1–141.)

An amendment to the bill was filed on the 9th of March, 1896, setting forth in substance that the Interstate Commerce Commission, before the commencement of the suit, requested the Attorney-General of the United States to direct the United States District Attorney for the Southern District of New York to institute the suit, and that the Attorney-General did thereupon direct the said United States District Attorney to institute all necessary proceedings to prevent the Agreement from being carried into effect, and to have it declared null and void, both as a violation of the Interstate Commerce Act, and of the Anti-Trust Act (so called) of July 2, 1890. (*Record, fols.* 142–147.)

All the defendants answered the bill.

The several answers of the Joint Traffic Associa-

tion, the New York Central and Hudson River Railroad Company, the Lake Shore and Michigan Southern Railway Company, and the Lehigh Valley Railroad Company, and the joint answer of the Pennsylvania Railroad Company and eight other companies, defendants, are printed in the record (*fols.* 184 *to* 618). And it is stipulated in the record that the remaining defendants filed several answers identical in form and effect with that of the New York Central and Hudson River Railroad Company, and which are agreed to be omitted in the printing (*fols.* 620-629).

The answers are substantially similar in their denials, averments and legal effect, and set up the same defences.

They admit the incorporation of the various defendants as common carriers, and that they form several systems or lines that are in competition with each other in interstate transportation. That they have executed the Agreement, of which a copy is annexed to the bill, have organized under it in accordance with its terms, and propose and intend to carry it out according to its true intent and meaning, and not otherwise. And (by amendments to the answers) they admit that the Interstate Commerce Commission ordered a copy of the Agreement to be sent to the Attorney-General of the United States. That afterwards and before the commencement of this suit, the chairman of that commission addressed to the Attorney-General a letter, of which a copy is set forth (*fols.* 264 *to* 266), but whether by authority of the Commission the defendants do not know and are not informed

They deny all the other facts and inferences of fact set forth in the bill. And especially deny all the various unlawful intentions and purposes which are charged against them in the bill, and all intentions and purposes except those expressed in the Agreement itself. They deny that any such unlawful intentions as are charged, are expressed in or are fairly to be deduced from the Agreement. And they

insist that the Agreement is not in any respect unlawful, or in violation of any statute of the United States.

They further state the true intent and object of the formation of the Traffic Association, what it is intended to effect, in what manner, and for what reason. And state the facts which show that these purposes are beneficial to the public, and in no respect unlawful. And they answering say, that such an association and agreement have become and are necessary to the proper discharge of the duties imposed upon the companies by their charters, as well as to the maintenance of those just and reasonble rates without which the roads cannot be operated. And they state fully and explicitly the facts and circumstances which render the Agreement indispensably necessary to those ends.

They deny that this suit was instituted at the request of the Interstate Commerce Commission, unless the letter of the President of the Commission above referred to amounts to such a request, which they deny. Or that said Commission ever took any other action in the premises, or made any order or report therein, as required by law, or gave the defendants any notice or opportunity to be heard in respect thereof.

The defendants further insist, that the grounds of relief attempted to be set up in the bill are distinct and separate, and cannot be united in the same suit. That the complainants are not entitled to maintain the suit upon the mere general allegations which the bill contains, without specifying the statute claimed to be infringed, and the particulars in which it is claimed to be violated. Nor on the mere allegation that the Agreement is in violation of the rights of citizens of the United States. And claim the same benefit of these objections as if they were taken by demurrer.

The case was heard in the United States Circuit Court for the Southern District of New York, where the bill was dismissed. That judg-

ment was affirmed on appeal and on hearing, by the Circuit Court of Appeals in the Second Circuit, from which decision this appeal is taken by the Government. (*Record, fols.* 631-650, 670-674, 233-234, 241-250.)

There are fourteen assignments of error, which only set forth in substance the failure of the Circuit Court of Appeals to sustain the bill, and to grant the relief therein prayed.

POINTS.

First Point.—As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken as true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill.

The facts on which the case stands are therefore to be found exclusively in the answers, either in the admissions or in the responsive averments which they contain.

Second Point.—The denials in the answers, as above pointed out, completely negative all the charges of illegal intent on the part of the defendants which are contained in the bill, unless they are found to result necessarily from the terms of the agreement itself.

The actual intention of the parties to the Agreement is a fact, not a conclusion of law, except so far as it is the necessary result of the language employed; and is the controlling fact where the decree sought is an injunction. It may well be charged in

the bill, and perhaps is charged, that the parties have an actual illegal intent not necessarily to be inferred from the language, and for which the agreement is really a cover. This is an averment of a fact, and being denied in the answers the denial prevails, since the answers are not traversed. And the complainant's case is thenceforth restricted to the intent which is the necessary inference from the terms of the agreement, and not open to be contradicted by parol evidence.

In other words, to quote from the brief of the Government in the Court below, "*the complainant's whole case is the contract.*" The case is therefore on the question of the unlawfulness of the acts sought to be enjoined, reduced by the record to the single question, whether the Agreement *on the face of it* violates the Federal law.

Third Point.—Whether the Agreement by its terms violates the Federal law, depends entirely on the enquiry whether it conflicts with any statute of the United States.

The bill is not based upon any statute, but proceeds apparently upon common law grounds. No statute is referred to, or charged to have been violated.

The United States has no common law.

"The United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and not elsewhere. It must therefore find its power to punish crimes, in laws of Congress passed in pursuance of the Constitution, defining the offences, and prescribing what courts shall have jurisdiction over them. No act can be a crime against the United States which is

not made or recognized as such by Federal constitution, law or treaty."

Cooley's Principles of Cons. Law, p. 138.

See also

Wheaton v. *Peters*, 8 *Pet.*, 591.
United States v. *Hudson*, 7 *Cranch*, 32.
Bucher v. *Cheshire R. Co.*, 125 *U. S.*, 555.

This case must, therefore, in order to succeed, be brought within the prohibition of some act of Congress which creates the offense, and confers the jurisdiction.

Fourth Point.—The only statutes of the United States that are claimed to be infringed by the terms of the Agreement, are the "Interstate Commerce Act," of February 4, 1887, amended by acts of March 2, 1889—February 10, 1891, and February 8, 1895, and the Anti-Trust Act of July 2, 1890.

Whether these statutes, or either of them, if infringed, confer upon the Court the power to grant the relief here sought, upon the facts disclosed by the record, and whether this bill is so framed as to admit of the exercise of that power in the present case, are questions that will be discussed later.

We consider first the enquiry, whether upon those facts, either of the statutes have been or are intended to be violated.

Fifth Point.—The Agreement violates no provision of the Interstate Commerce Act.

The only provision in that Act that is claimed to be infringed, is contained in *Sec.* 5, which prohibits "*pooling.*"

And there is no clause in the Agreement in which any infringement of this section is suggested, except *Article* 8, which provides as follows:

"The managers are charged with the duty of securing to each company party hereto, equitable proportions of the competitive traffic covered by this agreement, *so far as can be legally done*."

This article is not in conflict with *Sec.* 5 of the statute.

I.—"Pooling" means a division of the money earnings of traffic, which this article does not contemplate.

Such is the obvious meaning of the language. The words "pooling of freights" and "dividing the proceeds of the earnings" refer to the same thing; the latter is a definition of the former, or the expression of the same idea in different words, rendered necessary because the word "pooling" is a new word, without legal significance, and its general meaning is very uncertain. Both expressions are therefore employed in order to make the intention clear.

The word "freights" is used in the Act as referring to the earnings for carrying goods (*Sec.* 20), while the word "freight" in the singular is used to express the property carried (*Sec.* 6); such is also the ordinary meaning of the terms. The language of the Act is hence to be regarded as prohibiting not two different things, but one thing.

Or perhaps as prohibiting in one form of words the agreement to pool, and in the other the act of pooling, which might take place without agreement. The former, being a continuous act, is visited with a continuous penalty.

II.—This intention of the Act becomes still more clear, when resort is had to the supposed mischief against which it is claimed to be directed.

The pooling of earnings was considerably practiced, and was very much, though probably very unjustly, complained of. It was very easy of accomplishment, as it was purely a money transaction.

A division of freight carried, on the other hand, was rarely complained of. It could only be done to a very limited extent, and it is impossible to see how it should do any harm.

Putting freight consigned to different competing roads into a common stock is usually nearly impossible. Each has, almost always, its separate station, and to transfer freight thence to another road would cost as much as to transport it; and would violate the contract of consignment under which it was received. For when freight passes over successive roads forming a continuous route, it must still follow the consignment given to it by the shipper, in determining the roads over which it shall go.

Only in those rare cases, in which it reaches an intermediate point from which there are competing roads having the same station house, with no directions as to which road the freight shall take, would a division of it among them be practicable.

But what possible harm to the shipper who has given no other direction, could that do? The rates of carriage are not increased, and his freight reaches its destination by a route immaterial to him, and at the same cost.

It is not to be presumed, until clearly shown, that it is the intention of the Act to make that penal which is either innocent, or virtually impracticable.

III.—But this discussion is really unnecessary, even though a division of the freight itself is intended to be prohibited, since *Article 8* of the Agreement provides for no such thing. Its language is indefinite, and perhaps ambiguous, as clauses inserted in contracts in order to reconcile conflicting and uncertain ideas among numerous parties, are apt to be.

But ambiguity of expression does not justify the inference of a criminal intent. The presumption is the other way. And the criminal intent must affirmatively appear.

No definition or criterion is given in *Article 8* by which it can be ascertained what are "equitable proportions of traffic." No means are indicated by which they can be brought about. No penalty for a failure to effect them is provided. The whole vague proposal is left to the unrestricted discretion of the managers.

They are charged with the "duty" of doing something that is not defined, by some means not stated, and with no consequences, if they omit to do it all. This cannot be brought within a penal statute by the gratuitous suggestion, without proof and against the record, that possibly these managers may conclude to discharge this "duty" by criminal means.

IV.—But what is conclusive in respect to the effect of this article in the only particular material to this branch of the case, the violation of the Interstate Commerce Act, is its concluding language: "*so far as can be legally done.*"

And likewise the express provision of Section 3 of Article 7: "The powers conferred upon the manager shall be so construed and exercised *as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto.*"

Whatever else the article means, action under it is limited by these restrictions to such steps as can be taken in conformity with law. There are various means that might be lawfully employed for the accomplishment of the object referred to, such, for instance, as the allowance of "differentials" in certain cases, whereby a carrier might be allowed to charge a lower rate than that established. And the very ambiguity of the statute may probably have

suggested the provision in this article, that the managers should go as far in the direction indicated, if found necessary, as it should be ascertained that the law allowed.

In order, therefore, to make out of this article an infringement of the statute, it will be necessary to reverse the explicit meaning of its language, and to substitute for the concluding and controlling words it contains, these: "*whether it can be legally done or not*, and *whether it violates the express provisions of this Agreement or not*."

And to hold that an agreement not to violate the law, in and of itself and *by its terms* infringes the law to which it refers. This, too, under a penal statute, and against the presumption of lawful intent that the Agreement is entitled to until the contrary appears, even though it contained no assurance on the subject.

And against the denials of unlawful intent on the record, which under the pleadings are not open to question.

V.—The argument on the part of the Government, and the cases cited in support of it, relating to the effect of the words quoted from *Article 8*, have no application to the case.

It may be conceded that an agreement to do an unlawful thing cannot be made lawful by the insertion of a saving clause, declaring that no law is to be violated. Because the thing provided to be done is in itself and necessarily a violation of law. But in this article no means are indicated by which its purpose is to be effected, if it is to be effected at all. It may certainly be done by legal means, though it might possibly be done illegally. But illegal means are absolutely excluded by the language, which restricts the managers to the employment of lawful means only, if they employ any.

Sixth Point.—Even assuming that this clause in the Agreement can be construed into a violation of the 5th section of the Interstate Commerce Act, this suit would not be maintainable, because it is unauthorized by that Act, and precluded by its express provisions.

I.—This Court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States Government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offense; unless such power is specially conferred by statute.

And especially where, as in this case, the Government has no interest of its own that is in danger of being affected.

Such a power is not conferred by any general statute of the United States.

Nor does it come within the general equity jurisdiction of the Court, since an injunction of that character is unknown in equity jurisprudence.

U. S. v. *Debs*, 158 *U. S.*, 1.

II.—No power to grant an injunction against a "pooling" contract is conferred upon the Court by the Interstate Commerce Act.

Pooling is simply made criminal and punishable by fine (Sec. 14).

In two other cases of very different character arising under this act, the power to grant injunctions is specially given to the United States Circuit Court, but only at the suit of the Interstate Commerce Commissioners.

One of these is found in the 6th Section, which authorizes an injunction against a carrier to restrain him from any interstate transportation, when he has neglected or refused to comply with the pro-

visions of that section in respect to filing and publishing schedules of rates.

The other is in the 16th Section, which provides that an injunction may be granted on the application of the Commissioners to restrain a carrier from continuing the violation of any order or requirement of the Commissioners, and enjoining obedience to the same.

The Act contains no other provision for an injunction in any case arising under it, or for the infringement of any of its provisions.

III.—The Interstate Commerce Act does not authorize the commencement *of any suit* until an enquiry and decision of the Commissioners has first taken place, which in this case has not taken place.

By the 12th Section it is made the duty of United States District Attorneys, upon the request of the Commissioners, to institute in the proper court and to prosecute, "*all necessary proceedings for the enforcement of the provisions of the Act, and for the punishment of all violations thereof.*"

But a reference to the context, and to the elaborate provisions contained in the Act for enforcing its requirements and punishing its violation, shows that the "necessary proceedings" referred to in the 12th Section are those which *the Act* makes necessary and designates. And a careful reading of the whole Act discloses that it contains a complete and consistent system of remedial procedure, which excludes the idea that the Courts can be invoked, except in aid of it.

The Commission created by the Act is "*authorized and required to execute and enforce the provisions of this Act.*" It is empowered to adopt its own rules and system of procedure, and to sit anywhere in the United States, all its expenses being defrayed. It is invested with extraordinary and *quasi* judicial powers for compelling the attendance of parties and witnesses, and the production of

"*books, papers, tariffs, contracts, agreements and documents*" from any part of the country, upon the complaint of any aggrieved party, of any State Railroad Commissioner, or on its own motion. It is required to hear and investigate every case and complaint arising from anything done or omitted to be done in violation of the provisions of the Acts, to decide the case and to make any necessary or proper order in respect to it, and to make report thereof and of the findings of fact on which it is based, which report shall be entered of record, and a copy furnished to each party.

But *in aid* of this jurisdiction of the Commissioners, the power of the Federal Courts may be invoked. In case of a disobedience of a subpœna either to attend or to produce papers, the Court may make the necessary order and punish as a contempt the failure to obey it. If testimony by deposition is required, it may be taken before a Federal judge or officer, and attendance for that purpose compelled. And when an order or requirement which has been made by the Commissioners in any case shall be disobeyed, they may apply to the United States Court, which shall fix a time and place for summary trial, require the attendance of the party recusant, and proceed to a hearing, on which the findings of fact by the Commissioners shall be *prima facie* evidence. And if it is found that any lawful order of the Commissioners has been disobeyed, the Court (as before pointed out) may enforce it by injunction, prohibitive or mandatory, and compel observance of their order by severe penalties.

Violations of the Act are also made misdemeanors punishable by fine, upon prosecution in any United States District Court having jurisdiction.

These are therefore the "necessary proceedings" for the enforcement of the provisions of the Act, which the Commissioners are authorized to require the District Attorney to institute in the Federal courts, in aid of their own jurisdiction, not in the place of it.

For these, special power is in every instance conferred on the court by the Act, and no other power in the matter is given to the courts.

Not a word in the Act, except the clause above quoted, tends to support the contention that an original suit like the present may be brought in the Federal courts in the first instance. The very section in which the clause is found, shows by its subsequent language that the investigation it provides for is by the Commissioners and not by the courts. And every provision in the Act relating to remedies or enforcement supports this construction.

And if, as in this case, the "necessary proceeding" demanded is one that is not within the general jurisdiction of the court, and no special authority for it is given, then the court has no power to entertain it, and the remedy appealed to must be the complete remedy provided by the Act.

For it is impossible to maintain that a court is invested with unlimited power to do anything and everything not within its ordinary power or jurisdiction that the Commissioners may deem "necessary," merely by a clause that makes it the duty of the District Attorney, when requested, to institute in the court "necessary proceedings." Especially when the Act clearly shows what proceedings are referred to, and confers upon the court the power to entertain them.

It will be seen, upon an examination of this statute, that the original jurisdiction of the Commissioners in respect to its violation, aside from the criminal proceedings under it, and from the right of action given to injured parties, is intended to be exclusive, not concurrent. And that the jurisdiction of the Circuit Court, except so far as ancillary for certain special purposes, is in effect appellate.

The propriety and necessity of this conclusion will become apparent, when it is considered that if this were not so, the burden that might be thrown upon the Circuit Courts would be beyond their power

to discharge, with any regard to the interests of other suitors.

And when it is further considered, that cases under this Act involve much more than the issues of law and fact with which courts are usually charged, and require indispensably a familiarity with the intricate and far-reaching details of railroad management, which no court, unless devoted entirely to that purpose, can be expected to possess or to acquire.

And that these cases necessarily require also, the extraordinary powers for reaching persons and papers in other States, and for summary proceedings, which are conferred upon the Commissioners, and are not possessed by the courts.

Seventh Point.—The Anti-Trust Act of July 2, 1890, does not apply to the business of railway transportation.

It will be claimed that the decision of this Court in the case of the Trans-Missouri Association (166 *U. S.*, 290), is decisive upon this point, as well as upon the further question whether the Agreement here under consideration is a violation of the provisions of the Anti-Trust Act.

In respect to the latter question it will be found on comparison that very material differences exist between the agreement shown in that case, and the case that is presented here. So that the decision there is by no means controlling in the present case. These points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated.

But we conceive it not to be improper, so far as it may be necessary, respectfully to ask of the Court a reconsideration of the conclusions reached by the majority of the Judges in that decision, which overrules the judgment of six United States Circuit and District Judges who sat in the different stages of

that case and of this, and is opposed to the opinion of four members of this tribunal, and also overrules the decision of Mr. Justice Jackson in the case *In re Greene*, 52 *Fed. Rep.*, 109, which is directly in point.

Its consequences are far-reaching and disastrous. It deprives the citizens of this country of the right, never before questioned in an English or American court, of making a large class of just and reasonable contracts, often absolutely necessary to the use of property, the transaction of business, and the fair compensation of industry. The justice or the sound policy of such a result is not asserted. The decision turns upon the construction of the ambiguous language of an Act, which it is virtually conceded ought not, as so construed, to be the law. However correct and necessary as a matter of law this construction may be, its result has been received by the public with surprise and alarm.

The argument in opposition to it has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice WHITE, that it is hardly possible to add to it, nor is it necessary to repeat it. A summary only is here presented, of the general propositions of law relied on in support of the judgment of the court below, from which the appeal in the present case is taken.

I.—The intention of the statute, in respect to its application to this case, as shown by the great diversity of judicial opinion in respect to it, is doubtful.

This doubt must be solved by the ordinary rules of legal construction in such cases, which are likewise the rules of justice and good sense.

II.—These rules all tend toward one conclusion, the attainment of a construction that is *reasonable*,

in view not only of the language, but of the situation and existing circumstances that attended its passage; that is to say, "*the old law, the evil and the remedy.*"

These considerations control and determine the meaning of language that is ambiguous, and often when they create an ambiguity which upon the mere words might not exist.

Many decisions of this Court to this effect are cited by Mr. Justice WHITE, to which many more might be added.

III.—In the Anti-Trust Act the plain object is to reach and put down mischievous trusts in restraint of trade, and monopolies.

This is shown by the title, and by the whole context of the act. They cannot be read without perceiving at what it was aimed.

Two of its eight sections at least (*6 and 7*), though of expressed general application to all contracts reached by the act, could have no possible application to the contract in this case.

The collocation of the word "*contract*" wherever it occurs, either in the title or the body of the Act, with the words "*unlawful*," "*combination*," "*conspiracy*," "*monopoly*," shows clearly what description of contracts is referred it.

The purpose of the act was also of common knowledge and notoriety when it was passed and ever since. Monopolies and trusts which served to create them, had reached proportions which had greatly and justly excited public attention, and legislation against them was loudly called for. This was shown in the widespread discussion of that subject in Congress, in the press, and in public speeches.

Against this notorious evil there was no law of the United States.

Says Mr. Justice JACKSON in *In re Greene:* "We have not deemed it necessary or proper to attempt the difficult task of defining the cases to which the Act will apply. The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations which the State courts have in most instances declared unlawful."

The whole subject of railway transportation, on the other hand, including especially the regulation of its rates, tariffs and charges, had been carefully and entirely covered and dealt with by the preceding Interstate Commerce Act, which contains every provision in respect to it which Congress thought needful, provides a complete system of remedies, restrictive, punitive and compensatory; constitutes an important tribunal to enforce them, armed with all necessary powers; and confers a special jurisdiction upon the United States Courts in aid of it.

By various successive amendments this system of regulation, procedure and remedy had been assiduously enlarged, until it covers every point requisite to be dealt with.

It is impossible to suppose that in the face of this existing law it was intended to include the business to which it relates, in the vague and general terms of a subsequent statute, passed for another and different purpose, and giving a different set of remedies and very different penalties, for the same transgression.

In such a case another well established rule of construction intervenes.

Where a special statute fully covers the subject to which it is addressed, and a subsequent general statute contains words that might, if standing alone, receive a construction broad enough to include the

same matter, the general will always give way to the special statute, and will be regarded as not intended to intrude upon its province, unless that intention is clearly manifested.

And especially will this construction be given, where, as in the present case, the statutes, if taken to relate to the same thing, would not only be superfluous but inconsistent.

Endlich on Stat., Secs. 113-137, 225.
Bishop on Written Law, Sec. 126.
Brewer v. *Blougher*, 14 Pet., 178.
Reicke v. *Smythe*, 13 Wall., 164.
Atkins v. *Disintegrating Co.*, 18 Wall., 472.
United States v. *Landers*, 22 Wall., 272.
Townsend v. *Little*, 109 U. S., 504.

If this were not so, and both these statutes are to be taken to apply to this subject, then they are *in pari materia*, and must be construed together. In that case the Anti Trust Act, which is the later, repeals all provisions in the Interstate Commerce Act which are inconsistent with it. A comparison of the two acts shows that these inconsistencies are extensive. And if the inconsistent provisions in the first are repealed, its efficiency is materially crippled, and the whole subject is thrown into confusion.

It is not to be believed that this result was intended.

Nor has it been so treated in the seven years that have since elapsed, by Congress, by this Court or any other, or by the Interstate Commerce Commission.

We have therefore on the one hand a great and manifest evil, demanding legislation, and against which none existed.

On the other, a system of established and extensive business, indispensable to the public accommodation, completely regulated and controlled by a

carefully devised and matured body of statute law which is specially full and effectual in the very particular which it is now claimed the Anti-Trust Act is designed to apply to, the protection of the public against unreasonable charges.

To what conclusion in respect to the purposes of this act does the criterion of "the old law, the evil and the remedy" conduct?

IV.--It is further to be observed on the question of the interpretation of this statute, that it is a penal act throughout, and must receive a strict construction. And this equally whether a remedy under it is invoked in a civil or in a criminal proceeding.

If the additional remedy by injunction is given by a statute which makes the act to be enjoined criminal and punishable, the statute does not for that reason cease to be penal. Nor can it be penal in one proceeding under it and not in another. That question depends on its character and purpose, not upon the form of the procedure.

Manifestly the act must receive the same construction in this suit that it would upon an indictment, for an agreement cannot be restrained which the act does not condemn.

The injunction which it authorizes is one that is unknown to equity jurisprudence, and rests entirely upon the statute. It is only ancillary to the other provisions, and therefore is in itself a penal remedy.

Says Chief Justice MARSHALL in *U. S.* v. *Wiltberger*, 5 *Wheat.*, 95: "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself."

And in *U. S.* v. *Morris*, 14 *Pet.*, 475, the Court remarked: "It has been long and well setted that such (penal) statutes must be construed strictly."

This rule of strict construction applies as well to questions that arise to the application of the act as to those that relate to the effect of its provisions.

In *Harrison* v. *Vose*, 9 *How.*, 378, this Court observed: "In the construction of a penal statute it is well settled also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. * * * This principle of construction does not make an exception in the act not made by Congress, as is sometimes objected, but it recognized a limitation allowed or required by the act itself, in order to give to it what it must reasonably be supposed the Legislature designed, a natural and obvious intent."

In the case of *The Schooner Enterprise*, 1 *Paine*, 32, Judge Livingston says: "It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense, unless it be created and promulgated in terms which leave no reasonable doubt of its meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the Legislature. If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary, especially if the consequences be so penal as hardly to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation."

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the Legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused."

Per DILLON, *J.*, in *U. S.* v. *Whittier*, 5 *Dill.*, 219.

See also among many other cases:

U. S. v. *Sheldon*, 2 *Wheat.*, 119.
U. S. v. *Hartwell*, 6 *Wall.*, 395.
U. S. v. *Shackleford*, 5 *Mason*, 445.
U. S. v. *Clayton*, 2 *Hill.*, 219.
U. S. v. *Garrettson*, 42 *Fed. Rep.*, 22.

In *Dwarris on Statutes*, 641, the author remarks: "In like manner in the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject;" for this plain reason, says HEATH, *J.*, in *Hubbard* v. *Johnston*, 3 *Taunton*, 177, "that the Legislature is ever at hand to explain its own meaning, and to express more clearly what has been already expressed."

It can hardly be denied, that there is not merely a reasonable but a very grave doubt whether the terms of the Anti-Trust Act were intended to include contracts like the one here in question, when it is remembered that out of the sixteen Judges who in the trans-Missouri case and this case have heard the question argued, including (with Mr. Justice JACKSON), five members of this Court, ten were of the contrary opinion.

Would it not be well under these circumstances, before adopting a construction of a penal law that entails consequencs so serious and so unjust, to permit Congress to express its intention, if such be its intention, more clearly?

It is in the light of the purpose thus ascertained, and of these considerations and rules of construction, that the language of the Anti-Trust Act is to be viewed.

V.—But if any doubt could still exist on this point, it is completely set at rest by reference to the

proceedings of Congress in both Houses, on the passage of the Anti-Trust Act.

Cong. Record, Vol. II., Part I, *p.* 96, *Part* IV., *pp.* 3153-3857; *Part* V., *pp.* 4099, 4104, 4123, 4753, 4837; *Part* VI., *pp.* 5453, 5950, 5981; *Part* VII., *pp.* 6116, 6208, 6312.

From these it will be seen that the bill passed in the Senate originally in its present form; that the House adopted an amendment extending its provisions to the traffic agreements of railways; that the Senate amended this amendment so as to restrict it to agreements raising rates above what is just and reasonable; that in this amendment the House refused to concur; that a committee of conference of the two Houses recommended that the Senate amendment be accepted; that the House refused to adopt it, and adhered to its own amendment; that a second conference committee was appointed, and recommended that both Houses recede from their amendments, which report was adopted, and the original bill passed without amendment. The report of the first conference committee shows that it was clearly understood in both Houses that the original bill (the present bill) did not apply to railway contracts at all, and required an amendment if it was so to apply. And that the controversy between the two houses was, whether in extending it to such contracts it should make all restraint of competition illegal, or only such restraint as raised rates above what was reasonable and just.

The Supreme Court of the United States held in the case of *Blake* v. *Natl. Bank*, 23 *Wall.*, 307, that reference to the Congressional Journals may be had, on a question as to the meaning of the language in a statute, in order to ascertain by the amendments proposed, made or rejected, and by the reports of committees of conference, what the inten-

tion and understanding of Congress was. And the statute in that case was construed by the light thus obtained, which was held to be decisive.

See also to the same effect:

Gardner v. *Collector*, 6 *Wall.*, 511.
Holy Trin. Church v. *U. S.*, 143 *U. S.*, 465.

This is very different from a reference to the views and speeches of individual members, which, as it has been repeatedly decided by this Court, are not proper to be taken into consideration.

Aldridge v. *Williams*, 3 *How.*, 24.
U. S. v. *Pac. R. Co.*, 91 *U. S.*, 79.
Dis. of Col. v. *Wool Market*, 108 *U. S.*, 25.

Eighth Point.—Assuming for the purposes of the argument, that the Anti Trust Law does apply to railway traffic contracts, no provision of that law is violated by the Agreement now under consideration.

The prohibitions of the act are two:

I.—Against contracts, combinations or conspiracies in restraint of trade or commerce.

II.—The monopoly of, or the attempt or combination to monopolize any part of the trade or commerce of the States, or with foreign nations.

I.—The Agreement in this case is not "in restraint of trade or commerce."

The theory of the bill appears to be that the Agreement comes within this description, because it tends to restrict competition, and because any agreement that restrains competition is "in restraint

of trade." Both these assumptions are erroneous, the one in fact, the other in law.

The Agreement *does not* restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

By the provisions of the Interstate Commerce Act, all carriers are required to print in large type and conspicuously post so as to make them accessible to the public, their rates, fares and charges, and to file copies thereof with the Commissioners, and to make no change in such rates except by ten days' public notice of an increase and three days of a reduction, to be given and filed with the Commissioners in the same manner. And are prohibited from demanding or receiving any greater or less rates than those thus published and in force at the time.

The mischief against which the Agreement is directed is not the change of the published rates in the manner so required. Because no company could gain any advantage over its rivals in that way, since any change thus publicly made would be immediately adopted in self-defense by all other competing rivals. But against the *secret* acceptance, through soliciting agents, of rates *lower than the existing published rates*, whereby business may be diverted from other roads which adhere to them. This is the destructive competition that railroads have to contend with, forbidden by law, opposed to all fair dealing, and yet heretofore inevitable.

For the repression of this illegal traffic, the Agreement abolishes the soliciting agencies through which it takes place, provides that no deviation from established rates shall be made by any company except *through resolution of its Board of Directors*, forwarded immediately to the managers of the traffic association, and not to take effect until thirty days after its receipt by them. And it is in such case made the duty of the managers to act promptly for the protection of the parties to the Agreement.

This can only be done by a general reduction of rates by all the parties to meet that which has taken place.

It is therefore the unlawful and illegitimate competition only, that in the practical and natural operation of the Agreement it tends to suppress. And that only by bringing it into the light of day, and compelling it to be done in a legal way, so that other companies can have a fair opportunity to meet it. In other words, by making competition a real competition open to all competitors, instead of a secret and dishonest advantage to be obtained by one over another. Is this not to the advantage of the public, as well as of the railroad companies?

It is true that by the terms of the Agreement the managers *may* make recommendations in respect to rates. They are not required to make them, and may never do so. But these, if made, are not binding upon the parties. They only agree either to comply with them, if affirmed in case of appeal by the Board of Control, or to pay a penalty which is insignificant in proportion to the business affected, and which is applied toward the expenses of the association. But any member upon thirty days' notice can withdraw from the Agreement.

This, it will be seen, does not result in any actual or probable restriction of competition in any quarter where it is reasonably to be looked for. And upon an application for an injunction the view that is to be taken of its operation in the future should be practical, and not merely theoretical.

The question is, is the act complained of a real and substantial and not merely a constructive violation of the penal law?

II.—Assuming again, against the fact, that a certain restriction of competition is the necessary result of this Agreement if it is allowed to proceed, it plainly appears by its terms to be only such re-

striction of competition as is necessary to secure "*just and reasonable rates.*"

By the Interstate Commerce Act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates, as has been pointed out, are required to be published and kept open to public inspection, and to be filed with the Commissioners; and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners. And the companies are also made subject to the State laws regulating rates.

It is justly to be presumed, therefore, that the published rates of the various members of the association existing when the Agreement went into effect, were just and reasonable, in conformity with law, and approved by the Commissioners. And there is no suggestion to the contrary.

The agreement provides that these schedules of rates are "*reaffirmed.*" That the recommendations of changes in them by the managers must be such as "*may be reasonable and just.*"

And it is further provided as follows:

Sec. 3. *Art.* 7. The powers conferred upon the managers shall be so construed and exercised *as not to permit violations of the Interstate Commerce Act, or any other law applicable to the premises*, or any provision of the charter or the laws applicable to any of the companies parties hereto, and the managers shall *co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder.*"

Hence, it becomes perfectly clear, that no changes of rates can take place consistently with the Agreement, except such as are reasonable and just, in

conformity with the Interstate Commerce Act, and approved by the Commissioners.

III.—The precise question, therefore, under this clause of the Anti-Trust Act, is whether a contract that produces a result which the Interstate Commerce Act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is *for that reason* a contract for the unlawful restraint of trade.

Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce Act prohibits.

It is the statutes themselves that have prescribed a definition of this clause of the Anti-Trust Act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of transportation which the Interstate Commerce Act contemplates and provides for, are rates that are just and reasonable to the carriers as well as to the carried, cannot be open to doubt. The very words "just and reasonable" employed in that Act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered, there can be no comparison.

It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other.

This is the construction which this Court have given to the Interstate Commerce Act in this very particular.

In the case of *Texas & Pac. Ry.* v. *Interstate Com. Commission*, 162 *U. S.*, 197, Mr. Justice SHIRAS, in delivering the opinion of the Court, after an exhaustive review of the Interstate Commerce Act, says:

"The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: *That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable*, and to prohibit undue or unreasonable preferences or discriminations. That in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider the circumstances and conditions that reasonably apply to the situation, and that in the exercise of its jurisdiction the tribunal may and should consider *the legitimate interests as well of the carrying companies as of the traders and shippers*, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered "as well in the case of traffic originating in foreign ports, as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates are charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes, and are not undue and unjust, *the fair interests of the carrier companies*, and the welfare of the community which is to re-

ceive and consume the commodities are to be considered."

And he further remarks:

"It could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, *nor to overlook the property rights of those who had invested money in the railroads of the country.*"

There were dissenting opinions in this case, but not on this point.

In the same opinion some observations of Mr. Justice JACKSON, in the case of the *Baltimore and Ohio Railroad Co.* (43 *Fed. Rep.*, 37), were cited with approbation. He says: "The English cases establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate but proper to take into consideration besides the mere difference in charges, various elements, such as the convenience of the public, *the fair interests of the carrier*, the relative qualities or volume of the traffic involved, *the relative cost of the services and profit to the company*, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

This decision of Justice JACKSON was affirmed in the United States Supreme Court.

145 *U. S.*, 263.

That the Interstate Commerce Act authorizes such an agreement as this, has also been declared by this Court.

Referring again to the luminous opinion of Mr. Justice JACKSON, already quoted from, and again citing language that was repeated with approval in the opinion of the Supreme Court of the United States in the Texas-Pacific Railway case, he says:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable,

and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust Act taken by itself, but by that language considered in connection with the other statute of the United States which (if this applies) is *in pari materia*, and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect of them.

Granting that the Anti-Trust Act in terms makes all contracts unlawful that are in anywise "in restriction of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce Act as construed by this Court recognizes as the right of railway companies to receive, and provides means to secure?

It will hardly be claimed that the elaborate provisions of the Interstate Commerce Act on the subject of reasonable rates are repealed by the Anti-Trust Act. If both are to stand, as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Suppose that all that is contained in the Interstate Commerce Act in regard to rates of transpor-

tation was thus included in the Anti Trust Act, could it be then maintained that the Agreement here in dispute would be included in the "contracts in restraint of trade" that are declared unlawful? Or would it not be plain that this Agreement was taken by the provisions of those sections out of the scope and meaning of the general words in the first section, even though those words would otherwise have included it?

IV.—Quite aside from the provisions of the Interstate Commerce Act, giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same result is reached under the principles of the common law.

1. The term "restraint of trade" employed in the Anti Trust Statute has a common law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the Agreement an infringement of this statute, it must, therefore, be one that would be void at common law.

It is respectfully submitted on this point that in the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well settled common law definition distinct from its literal meaning, that is assumed to be the meaning intended, unless a different definition is prescribed in the statute.

Even the Constitution of the United States, a political document of an entirely unique character, has been from the outset subjected by this Court to this rule of construction.

Cooley Cons. Limitations, 75.

2. The definition at common law of a contract "in restraint of trade," is settled by a long course of decision, and is no longer open to discussion.

It is a *contract that restricts trade beyond what is reasonable and just, under the circumstances of the particular case.*

Every case must therefore be judged upon its own circumstances.

Says Mr. Justice JACKSON, in the case, *In re Greene*, 52 *Fed. Rep.*, 109, where the question was whether an agreement restricting competition among distillers associated in what is called the "Whiskey Trust," was void under the Anti-Trust law: "The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is executed. No precise boundary can be laid down as to when and under what circumstances the restraint would be reasonable, and when it would be excessive. In the present case the arrangement treated as a contract was founded upon a valid consideration, and only reserved to the vendors a reasonable protection in their business. It was not an unlawful contract in restraint of trade. The authorities fully support this conclusion."

In *Fowle* v. *Parke*, 131 *U. S.*, 88, the Court through Chief Justice FULLER say, in respect to contracts in restraint of trade: "The question is, whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not reasonable."

In *Oregon Steam Nav. Co.* v. *Winsor*, 20 *Wallace*, 64, Mr. Justice BRADLEY, speaking for the Court, says: "It is a well settled rule of law that an agreement in general restraint of trade is illegal and void, but an agreement which operates merely in partial restraint of trade is good, provided it is not unreasonable."

No review of the very numerous cases in the State courts on this subject is necessary. They are not always reconciliable, for the facts on which they arise differ very widely, and no question has as often been affected in some courts by considerations that

do not belong to the administration of justice. The foregoing citations from the more recent decisions of the highest Federal courts, clearly indicate the result of the best English and American authorities, and are sufficient for the present case. Many others are cited in the opinion of Mr. Justice WHITE in the Trans-Missouri case.

The case of the *Mogul Steamship Co.* vs. *McGregor* (21 *Q. B. Div.*, 553 - 23 *ib.*, 6—*H. of Lords App. Ca.*, 1892, *p.* 1), which dealt with an agreement of this sort among carriers, is an instructive one, and shows the law of England to be the same with that set forth in the cases above quoted. The decision was made by Lord Chief Justice Coleridge in the first instance, affirmed (with one dissentient) by the Court of Appeal, and unanimously by the House of Lords.

And the case of *Nordenfelt* v. *Nordenfelt Gun Co.*, in the House of Lords (App. Cases, 1897), an important and fully discussed case, is a direct authority upon the point that a contract is not "in restraint of trade" unless it is unreasonable, and therefore unlawful.

3. That the Agreement in question here is a just and reasonable one has already been shown.

Nor need it be shown, because the contract which was involved in the Trans-Missouri case was admitted by both the majority and the minority of the Court to be reasonable, though its terms, while substantially similar to those of the Agreement here, were less explicit in making it so.

4. The provision in the Agreement for the discontinuance of unnecessary and expensive agencies, is of no moment. No law requires their maintenance, and therefore it cannot be illegal to cease to maintain them. The real object of reducing their number was, as shown in the answers, to reduce useless expenditures, which are only required to meet ille-

gitimate competition. And to take away the means by which secret and unlawful cutting of rates was made possible.

5. Even if it should be held that the language of the Anti-Trust Act forbids *any* contract in restraint of trade, however just reasonable and necessary, the Agreement here in question would not fall within the prohibition, because it does not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

This view is so fully presented and discussed in the brief of Messrs. Carter and Ledyard, that further argument in support of it is not requisite.

V.—There is no ground whatever for asserting that the Agreement infringes the provision of the Anti-Trust Act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or at most, of a few. That is the plain meaning of it as employed in the Act. No feature of the Agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

Its effect will be, if it is successful, not to diminish, but to increase transportation facilities, by preserving roads that might otherwise be driven from the field.

The contention of the Government that any agreement that tends towards the restriction of unlimited competition is a monopoly, does violence to language, and only renews under another name the discussion already dealt with. If the Agreement is not unlawful upon the grounds previously considered, which include all the objections that can be stated to it, it will not become so by the misapplication to it of the term "monopoly," which for this purpose is a mere epithet.

On the contrary, the surest and most effectual way in which monopolies in railroad business can be fostered, is to prohibit those just and necessary arrangements between railroad companies by which alone the majority of them are enabled to survive.

The unavoidable result of unlimited competition in a business from which those engaged in it cannot withdraw without ruin, and must, therefore, continue to the very last, must be the gradual absorption of the weaker roads by the stronger, who will ultimately be placed beyond the reach of even just and fair competition, by the want of competitors.

And the Act of Congress, designed for no purpose whatever but to prevent monopolies, becomes, by such an application of it, an Act to create them in the only branch of business over which Congress has any authority.

Ninth Point.—If the construction of the Anti-Trust Act which was adopted by the Court in the Trans Missouri case is to stand, it is respectfully insisted that the Act, so far as thus interpreted, and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the Trans-Missouri case, because no such construction of the act was anticipated by counsel. Nor was it considered by the Court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered, unless raised by the party affected.

The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether *the Agreement here under consideration* is one that may be prohibited by legislation, without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

That a vast number of other contracts equally just and reasonable are equally affected, need not be pointed out. That there comes within the scope of the statute also, a large class of contracts which all law condemns, is just as apparent. This only illustrates the importance of a just discrimination, if not in the construction of the statute itself, in the application of the constitutional protection against oppressive legislation, to which private rights, when invaded, are entitled. It is the personal right that is infringed that invokes the protection, not the terms, the general object, or the effect in other cases of the statute in question.

I.—As thus construed and applied, the language of the Act becomes precisely this, so far as the present case is concerned; that any agreement between competing railway companies entered into for the purpose of maintaining rates of transportation, shall be unlawful, punishable criminally, and restrainable by injunction at the suit of the United States Government, notwithstanding it is made to appear that such agreement only maintains and is only intended

to maintain the just and reasonable rates which said companies are legally authorized to demand, and has not had any other or different effect. And, notwithstanding that it is further made to appear that such agreement is necessary to enable said companies to maintain such rates, and properly to transact the business authorized and imposed upon them by their charters.

The record before the Court conclusively establishes the fact that the Agreement here in question was so designed and intended, has not had and is not intended to have any other result, and is necessary, as determined by long practical experience, to the maintenance of just and reasonable rates, and to the proper discharge of the business of the companies.

The averments of these facts in the answers are full, explicit, and upon personal knowledge. They are consistent with and are sustained by the provisions and language of the Agreement. They are in the strictest sense responsive to the bill. And all the circumstances of the case which bear upon them are carefully and fully set forth and explained.

The truth of these averments is conceded by the complainants, by setting down the case for trial upon bill and answers. By these pleadings they are therefore concluded, so far as the facts of the case are concerned, and no room is left for inference, assumption, or conjecture inconsistent with the record. The case that is to be tried is the case that the record presents.

And in the Trans-Missouri case, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and the minority opinions of the Court, that its substantive character and purpose were such as the answers in the case aver and set forth.

It was for this reason believed by the minority of

the judges that it could not have been the intention of Congress that such a contract should be made a penal offense. But it was held by the majority that the language of the act admitted of no other construction. Though it was conceded in the opinion of the Court that the arguments against that conclusion "*bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply of maintaining those rates which were reasonably and fair.*"

And in the opinion of the minority of the Court by Mr. Justice WHITE, he remarks, after stating the general features of the contract, "*I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the Court rests upon that hypothesis.*"

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust Act, as so construed, is thus both established and conceded.

And the question distinctly arises, whether legislation having such a result is within the power of Congress.

II.—That the operation of the Act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants, (whether rightfully or not), of both liberty and property to a very grave and perhaps ruinous extent, is not open to question.

A just freedom of contract in lawful business is one of the most important rights reserved to the citizen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment.

And when any class in the community is so precluded, it is to that extent "deprived of the equal protection of the laws."

These are elementary propositions in constitutional law, and have been often asserted by this Court.

Pumpelly v. *Green Bay Co.*, 13 *Wall.*, 166.

Stone v. *F. L. & T. Co.*, 116 *U. S.*, 307.

C., M. & P. R. Co. v. *Minnesota*, 134 *U. S.*, 459.

Reagan v. *Far's L. & T. Co.*, 144 *U.S.*, 397.

III.—The only authority of Congress over the agreement in controversy is such as may be deduced from their power "*to regulate commerce.*" And is limited by the reasonable necessities of such regulation.

As contracts of this sort are not in themselves wrongful, have never before been held or deemed unlawful, and have been customary in all kinds of business in which they have been found useful, the right to prohibit them, if it exists at all, must arise under what is called the police power.

But the general power of police regulation is not vested in Congress. It is reserved to the States. In *U. S.* v. *Knight Co.*, 156 *U. S.*, 11, it is said by the Court: "It cannot be denied that the power of a State to protect the lives, health and property of its citizens is a power originally and always belonging to the States, not surrendered to the general government."

And it was upon that ground held in that case, that a combination in restraint of trade or to create a monopoly could not be punished or restrained under the Anti-Trust Act, unless it amounted to an interference with interstate commerce.

The railroad companies, which are parties here, were chartered by their respective States, and are subject to their charters and to the laws of their States in respect to rates and all matters thereto pertaining. The only authority in Congress over them is therefore that which is necessary to the regulation of interstate commerce, and which may be regarded as a special power of police regulation, so far as is requisite to the discharge of that duty.

IV.—No exercise of the police power, whether the authority on which it rests is general or special, can be allowed to infringe rights secured by the Constitution of the United States.

No public good can be attained and no public necessity relieved by unconstitutional means.

In the case of *N. O. Gas Co.* v. *Louisiana Light Co.*, 115 *U. S.*, 661, the Court said:

"Definitions of the police power must, however, be taken subject to the condition that the State cannot in its exercise for any purpose whatever encroach upon the powers of the general government, *or rights granted or secured by the supreme law of the land.*"

And in *Walling* v. *Michigan*, 116 *U. S.*, 446, per BRADLEY, *J.*:

"The police power cannot be set up to control the inhibitions of the Federal Constitution."

And in *Kugler* v. *Kansas*, 123 *U. S.*, 661, per HARLAN, *J.*:

"Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals or the public safety, is subject to the paramount authority of the Constitution of the

United States, and may not violate rights secured by that instrument." * * * "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or *is a palpable invasion of rights secured by the fundamental law*, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

To the same effect are many other decisions of this Court.

V.—Approaching then the consideration of the constitutional right of the defendants in error to enter into this Agreement, it is first to be observed that their right under their charters, and by the law of the land, to demand and receive just and reasonable rates of transportation, and to refuse to carry passengers or freight for less, is not open to dispute.

There is no case known to English or American law, in which any man can maintain a claim that the use of property should be furnished or services performed for him at less than a reasonable compensation, unless under a specific contract for a less sum. Even such a contract, if grossly unreasonable, will often on that account alone, and always if any other element of injustice or unfairness is connected with it, attract the interposition of a court of equity.

Railway companies, though creations of the legislatures, from which they derive their powers and to whose enactments they are subject, are no exception to this rule. Though the legislatures may regulate and to a reasonable extent prescribe their rates, it has been repeatedly held by this Court, and is now fully settled, that they cannot be reduced below a just and reasonable amount, fixed in view of all the circumstances of the case.

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 *U. S.*, 362, this subject was exhaustively considered upon full review of all the previous decisions in relation to it, and in the opinion of the Court by Mr. Justice BREWER it was held that a railroad company cannot be deprived by legislation of the right to just and reasonable rates, or compelled to accept less. And that the question of unreasonableness is for judicial consideration.

The same decision was made in *Stone* v. *Fars.' Loan & Trust Co.*, 134 *U. S.*, 418, and in *Ch., &c., R. Co* v. *Minnesota*, 136 *U. S.*, 459. In the latter case it was held that a court appointing a commission to fix railway charges, and making the rate so fixed conclusive, was unconstitutional, and that the company was entitled to just and reasonable rates, to be judicially determined in case of dispute.

If, therefore, each and all of these defendants, jointly or severally, should refuse to furnish transportation as common carriers unless for a reasonable compensation, *even though required to do so by statutes of their States*, they would be strictly in the exercise of their legal right, not only against the consignors, but against the Government itself.

And therefore the ground upon which the Agreement in the present case is claimed to be a violation of law, is not that the thing agreed to be done is unlawful, but that it *is unlawful for the parties to agree to do what is lawful, and what each of them has the right to do without any agreement; and what it has become necessary for them to agree to do beforehand, in order to render it possible for them to do at all; and what it is necessary to do, in order to the successful transaction of their lawful business.*

VI.—The true test of the constitutionality of a law which abridges the freedom of contract, must

necessarily be found in the reasonableness and justice of the contract abridged.

The power of the Legislature to prevent unjust and mischievous contracts where the public welfare requires it, must be admitted. The constitutional prohibition against the deprivation of liberty and property does not forbid such a law, because the freedom to make contracts of that character is not a part of the liberty of the citizen, nor is it a right of property.

But when, as in this case, the contract which a statute undertakes to forbid is not unjust or unreasonable, and is one that the general principles of law and morality sanction, and much more when it is seen to be necessary to the lawful enjoyment of lawful property, then the constitutional prohibition, designated as a protection against precisely such legislation, is directly encountered.

And if an interference of that sort may be justified upon the ground that the Legislature deems it proper, the constitutional provision is nullified. It comes only to mean that men shall not be deprived of liberty or property unless the Legislature chooses to do so, and that statutes having that effect shall not be passed unless the Legislature thinks proper to pass them.

This, then, must be the criterion: *Is the contract sought to be prohibited one that by the general principles of law and justice it is the right of the party to make;* or is it unjust, unreasonable, and mischievous, and *therefore* unlawful? To say that it can be forbidden, because made unlawful by the statute that forbids it, is simply to abolish the constitutional inhibition, and to give to Legislatures unlimited power.

The Legislature cannot create restrictions upon freedom of contract that the established rules of law and the dictates of justice do not justify, nor set up rights in any class of the community as against another class, which are not founded in law

or justice, and which result in taking one man's property for the unjust benefit of another.

That a line must be drawn somewhere that limits the power of the Legislature under the Constitution to abridge the freedom of contracts, is plain. Upon what other principle, or by what other rule is it possible to draw it? They cannot prohibit *all* contracts they may desire or attempt to prohibit. What contracts then may they not prohibit, if they may prohibit just, reasonable and lawful contracts at all?

In *Gibbs* v. *Balt. Gas Co.*, 130 *U. S.*, 409, Chief Justice FULLER says: "Innumerable cases might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interests, cannot be upheld." And cites with approval from *Bishop on Contracts, Section* 549, which enumerates the varieties of unlawful contracts, including "all detrimental to the public order and public good, *in such manner and degree as the decisions of the Courts have defined.*"

In *Austin* v. *Murray*, 16 *Pick.*, 121, it is held that the test of the validity of a public regulation where the subject dealt with is proper for the exercise of that power, is whether the regulation is *reasonable.*

In *Waters* v. *Wolf*, 162 *Penn. St. Rep.*, 153, it is held that the right to make any contract that is reasonable, and that imposes no unreasonable burdens upon others, is an indefeasible right which the Legislature cannot take away.

State v. *Goodwill*, 33 *West Va.*, 179, is to the same effect.

And also *Com.* v. *Perry*, 155 *Mass.*, 117.

VII.—The question has thus far been considered upon general principles. But there are many cases, in many courts, where statutes designed for the protection of the public against some real or supposed mischief have been held to be unconstitutional, on the ground that they invaded personal liberty and the right of property, by infringing the right to freedom of contract.

In *Allgeyer* v. *Louisiana*, 165 *U. S.*, 578, it was held by this Court that a statute prohibiting citizens of Louisiana from making contracts of insurance in companies outside the State which had not complied with the insurance laws of the State, was void, as depriving the citizen of his liberty without due process of law.

In *Shaver* v. *Penna. Co.*, 71 *Fed. Rep.*, 931, it was held by the United States Circuit Court in Ohio, that a statute of that State prohibiting railroad companies from entering into contracts with their workmen in respects to liability for personal injuries, was unconstitutional for the same reason.

The same statute was declared unconstitutional by the Supreme Court of Ohio, in the case of *Cox* v. *The Railway Co.*, 43 *N. E. Rep.*, 313.

In the Court of Appeals of the State of New York, several important cases involving the right to freedom of contract have been decided, and the subject has been discussed both in the argument and the opinions, with an ability and breadth of view that have commanded wide attention and approval.

In the case, *In re Jacobs*, 99 *N. Y.*, 98, an act prohibiting the manufacture of cigars in tenement houses was held void, as an unauthorized interference with the liberty of the citizen.

In *People* v. *Marx*, 99 *N. Y.*, 377, a statute prohibiting the sale of oleomargarine was adjudged void upon the same ground.

In *People* v. *Gibson*, 109 *N. Y.*, 389, an act which made unlawful what are known as "gift sales," that is, sales where a gift is made to the purchasers

if a certain amount is bought, was decided to be unconstitutional.

In the case of *Com.* v. *Perry*, 155 *Mass.*, 117, an act prohibiting manufacturers from imposing fines upon workmen, and withholding wages for defects in work, was held void.

In *Godchalk* v. *Wigeman*, 113 *Penn. St.*, 431, it was held that a statute which prohibited manufacturers from paying workmen in orders on a store, was void as abridging freedom of contract.

Similar statutes were held unconstitutional for the same reason in *State* v. *Goodwill*, 33 *W. Va.*, 179; in *Frorer* v. *People*, 141 *Ill.*, 171 (overruling *Hancock* v. *Yoden*, 121 *Ill.*), and in *State* v. *Loomis*, 115 *Mo.*, 307.

In *Waters* v. *Wolf*, 162 *Penn. St.*, 153 (before cited), a statute enacting that although a contract between an owner and a contractor for erecting a building provides that no mechanics' liens shall be filed, a sub-contractor shall nevertheless have a lien on the building for his work and materials, was declared unconstitutional.

In *Spry Lumber Co.* v. *Trust Co.*, 77 *Mich.*, 199, an act was held unconstitutional which gave the creditors of a contractor for the erection of a building, a lien on the building for materials furnished the contractor.

In *Kuhn* v. *Detroit*, 70 *Mich.*, 534, a law prohibiting a liquor dealer from becoming surety on a liquor dealer's bond, was held void as in violation of the 14th Amendment in the Constitution of the United States, as well as of a provision in the same words in the Constitution of Michigan.

In *Millett* v. *People*, 117 *Ill.*, 294, an act that provided that all contracts for mining coal should be void unless the compensation therefor was by weight, ascertained in the manner required by the act, was held to be an unconstitutional interference with the freedom of contract.

Similar statutes in respect to coal mining were held unconstitutional for the same reason, in *Ram-*

sey v. *People*, 142 *Ill.*, 380; in *Harding* v. *People*, 160 *Ib.*, 459; in *In re House Bill*, 21 Cal., 27.

In *State* v. *Julow*, 129 *Mo.*, 163, an act was held to be unconstitutional which prohibited employers from contracting with employees that they should not join or remain in a trades union.

In *Low* v. *Rees Printing Co.*, 41 *Neb.*, 127, a statute was declared void as abridging the right of free contract, which provided that a day's work should not exceed eight hours, and that for labor beyond that the employer should pay a compensation which increased in geometrical progression.

In *Ex parte Kuback*, 85 *Cal.*, 274, an ordinance was held unconstitutional which made it a misdemeanor to employ in work for the city any person to work more than eight hours in a day, or to employ Chinese laborers.

In the case, *In re Eight Hour Law*, 21 *Cal.*, 30, a statute prohibiting employees from contracting for more than eight hours work in a day, was declared by the Supreme Court of that State to be unconstitutional as in violation of the right of contract.

In *Loop* v. *St. L. R. Co.*, 58 *Ark.*, 407, it was held that the Legislature cannot make it unlawful for individuals to agree with each other that wages shall be paid at any time after they are earned. And that an act requiring those constructing railroads to pay employees on the day they were discharged, and giving a penalty for delay, was unconstitutional in the case of individual employees, but valid as against railroad companies chartered in that State, because taken to be an amendment of their charter.

In *Atchison R. Co.* v. *Baty*, 6 *Neb.*, 37, a statute was held void which allowed the owners of property destroyed by a railroad company to recover double its value.

And in *Yick Wo* v. *Hopkins*, 118 *U. S.*, 356, an ordinance was held unconstitutional which forbid laundry business within the corporate limits, except by consent of the supervisors, unless it was located in a brick or stone building.

These cases fully support the proposition that just reasonable and lawful contracts in relation to property or business cannot be made unlawful by legislative enactments.

Many of the decisions are by the courts of some of the newer States, where the Judges are elected by the people at short intervals, and where a mistaken public sentiment has demanded, and Legislatures which were its echo have therefore adopted, the various enactments that are held to be unconstitutional.

These circumstances do not lessen the authority of the decisions, and they reflect great honour upon the courts in which they were made.

VIII.—The police power when invoked to prohibit any act that is otherwise lawful, while it may fall short of the demands of public necessity by reason of constitutional limitations upon its exercise, can never exceed that necessity.

The right on the part of the public to the protection sought to be afforded, and the necessity for it, are not only the sole reason and foundation of the power, but designate the boundary at which in all cases it must terminate.

The existence of such a necessity when denied, is therefore a question for judicial determination. And the enquiry in the present case is whether it is to be found in the requirements of interstate commerce, since that is the limit of congressional authority in the premises.

As remarked by this Court through MILLER, *J.*, in *Chi Yung* v. *Freeman*, 92 U. S., 280, in reference to the right of a State to protect itself by the power of police regulation against paupers and criminals from abroad: "Such a right can only result from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

Says *Judge* CHRISTIANCY in *People* v. *Jackson and U. P. R. Co.*, 9 *Mich.*, 285:

"Powers which can only be justified on that specific ground (that they are police regulations), and which otherwise would be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, and so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

Tiedman in his treatise on Police Powers (*p.* 4), quoting this as a correct statement of the law, adds: "And in all such cases it is the duty of the courts to determine whether the regulation is a reasonable exercise of a power which is generally prohibited by the Constitution."

He remarks, further: "According to the maxim, *sic utere*, &c., it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. Any law which goes beyond that principle, which undertakes to abolish rights the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice as they have been developed under our republican institutions."

And, as declared by this Court in the case of *Kugler* v. *Kansas*, *supra*, "The Courts are not bound by mere form, nor are they to be misled by mere pretences. They are at liberty, and indeed are under a solemn duty, to look at the substance of

things whenever they enter upon the inquiry whether a Legislature has transcended the limits of its authority."

IX.—In determining whether any proposed legislation which affects the liberty or the property of the citizen is justifiable on the score of public necessity, two principal points are to be regarded; the right of the public to the benefit thereby derived, and the reasonable necessity of the means invoked to secure it.

It is not to be maintained that either liberty or property can be invaded in order to obtain for the public an advantage it is not entitled to.

Nor can that be set up as the right of the public which is only a benefit sought to be obtained by one class in the community at the expense and unjust loss of another, which is equally entitled to protection.

Nor can means prejudicial to private interests be sanctioned, when not necessary to secure to the public a benefit to which it is really entitled.

In all these respects, the legislation in question is destitute of the foundations essential to its validity.

1. The public is not entitled to the alleged benefit which is claimed to be the result of the prohibition of this Agreement.

The only ground on which such a prohibition has been attempted to be justified in argument, is, that "the public" is entitled to have maintained by law, by a prohibition of the only agreements that could prevent it, a competition which, however destructive to the carriers, is likely to result in affording to shippers of freight, rates of transportation that are less than reasonable and just.

It has already been shown that the competition

restricted by this Agreement is only that which reduces rates *below* that point.

That the shippers of freight are not entitled to have it carried for less than a just compensation, is a necessary corollary of the proposition that the carriers are entitled to receive a just compensation for carrying it. It is plain, therefore, upon the facts which the record presents, that the competition which is here claimed to be a right of the public, is one that couldonly result in giving to one class of the community what they are not entitled to, out of the pockets of another.

The claim is, in other words, that one class of the community is entitled to be protected in the opportunity to rob another. For he robs his neighbour who extorts from his embarrassment or distress, labour or property for less than a just price.

Suppose that instead of an agreement tending to the maintenance of just rates, one should be made, binding the parties under whatever stress of competition, not to transport passengers or freight for nothing. It is well known that competition between rival lines has sometimes become so bitter as to reach that result. Such a contract upon this theory would be equally criminal, as against public policy, because under it "the public" might lose the chance of being transported free at the carriers' expense. It has as much right to be carried free, as to be carried for a rate less than reasonable, and therefore in the end ruinous to the carrier.

Or suppose that the contract between these railroad companies had been, in so many words, that each bound itself to the other not to carry freight for less than the reasonable price they were legally entitled to receive. In other words, had expressed in terms what it now expresses in effect and intent. Could it be maintained that the public has a right

to prevent by legislation such a contract from being carried out?

2. The alleged public interest which is sought to be made the basis of this extravagant measure, is not the interest of the public, but of one class, which can only be secured at the expense and unjust loss of another.

Railway stocks and securities are much the largest personal investments in the country, in which many millions of investors, chiefly those of moderate property, are interested.

The total amount of reported railroad capital in 1894 was nearly eleven thousand millions.

The New York Central Railroad Company alone had on the first of April, 1897, 13,115 registered stockholders, and many times that number of bondholders. The savings institutions, and the trusts, public and private, for the support of charitable, educational and religious institutions, whose funds are embarked in the same securities, are innumerable. The money which these securities represent has created the railroads. To destroy or seriously to impair the income derived from them, would be a robbery which would inflict widespread and incalculable distress. The socialist idea, fostered among the ignorant by demagogues, that because the aggregate capital of a railroad company is necessarily large, its destruction would only affect the rich, and would in some unexplained way benefit the poor, is seen to be an imposture and a delusion as soon as it is perceived whence that capital is derived, to whom it belongs, and how far it enters into the industrial system of the country, upon which all business and all property depends. No one imagines that railways can be dispensed with, but it is supposed by those who know no better, that they may and ought to be compelled to do the business of "the public" at a loss.

Every railroad failure reaches likewise a multitude of unsecured creditors, throws many people out of employment, depreciates securities generally, and affects business unfavorably, sometimes disastrously.

The number of railroad employees in the United States in 1893 was about 874,000 men. Owing to severe depression in the railroad business, this number in 1894 had fallen to about 780,000. Not only was an army of 100,000 men forced out of employment, but there was a general cut of wages in all grades of the service. Five thousand general officers suffered, as well as 180,000 trackmen and 150,000 shopmen and about 500,000 other employees. Wages were lowered directly, and time was reduced by the same result indirectly. Industries depending on the railroads as buyers experienced a lack of demand, and in turn were forced to curtail the working forces or reduce wages, and many millions of people, besides those actually discharged and their dependents, found themselves less able to buy the necessaries of life.

Interstate Com. Commission, 7th Annual Rep., p. 32.

By an undue depreciation of earnings, which necessarily induces a low condition of roads and equipment, the general safety of the public, as well as adequate facilities in the transaction of business are imperiled.

These great lines are now so interwoven in many ways with the industries, the business and the financial affairs of the country, that their reasonable prosperity is vital to the general public interest.

Not more directly or deeply is the community at large interested in the solvency of the institutions which are allowed to issue the currency of the country--a solvency which it is conceded to be one of the highest duties of government to protect.

There is no greater curse to a business community than an insolvent railroad, struggling by all expedients to maintain an existence that its income cannot support, cramped in its facilities, unable to meet its engagements, fluctuating in its rates.

It can be no sound public policy that tends to drive agencies indispensable to all industry into such a condition.

It is very obvious, therefore, upon the least consideration of the subject, that the class who might be expected to profit out of a competition among railways that would reduce rates below what is just, is much more limited in number and importance than that at whose expense such an unrighteous profit must be extorted.

The language of this Court in *Reagen* v. *Far. Loan & T. Co.*, before cited, is pertinent upon this state of facts: "Is it just to deprive one party of all compensation in order that another may make more profit? They who invest their money in railroads take the same chances that other men do of making profit from the carrying on of their business, and as appears from other cases submitted to us with this, some of the railroads in the State of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural result of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business that cannot be abandoned at will, so to reduce their charges for revenue as to make the carrying on of that business result in a continual loss. In the one case the law is powerless to prevent injury; in the other it is used to effect injury. * * * The equal protection of the laws—the spirit of common justice—forbids that one class should be compelled to suffer loss that others may make gain."

3. Nor, if the shippers of freight by railroads were entitled to be regarded as constituting "the public," to whose interests the rights of all others must give way, can there be shown the slightest necessity for any such extreme and unprecedented means of protection against the danger of railway charges that are unreasonably high. There is no more occasion for it, even in their interest, than there is justification for it. For there is no mischief that can conceivably arise out of any form of restraint of trade, that is already so completely guarded against by effectual legal provisions as that is.

Quite independently of the ordinary legal protection which the common law affords against any unreasonable demand, railway companies are in the first place subject to the restrictions in their charters in the matter of rates, and to the provisions of the respective State laws relating to it. That these are severe enough is well known, and is shown by the various cases where only the interposition of the Federal Courts has prevented them from proving oppressive.

They are, in the next place, subject to the provisions of the Interstate Commerce Act, which render rates in that business which are in the least excessive, absolutely impossible.

If every railroad in the country was free from any competition whatever, it would still be out of their power to exact unreasonable rates in interstate commerce, in the face of the requirements of this law.

The fullness, efficiency and stringency of its provisions, to reach, prevent and redress any and every such attempt, can only be seen by a careful perusal of the whole Act.

All railroad rates and charges in interstate business, as has before been pointed out, are required by that Act, to be just and reasonable, and must be conspicuously posted for the information of the public, and filed with the Commissioners. They cannot be advanced but upon ten days' notice to the Commissioners and similar publication. If any such rates

so posted are unreasonable, it is the duty of the Commissioners to correct them upon their own motion, or that of any party aggrieved, or of any State Commissioners. If any unreasonable or unjust charges or improper discriminations are made against any person, he has a prompt and summary remedy, either by application to the Commissioners or by suit at law, at his option, for the damages he has sustained. And summary and severe punishment of the guilty party by fine and imprisonment is also provided for by the Act.

Congress had, therefore, before the passage of the Anti-Trust Act, fully exercised its power of police regulation of rates and charges of transportation in interstate commerce, by this carefully devised system of legislation.

By various successive amendments, by much experience of administration, and by many decisions of this Court and of the intermediate Federal courts, that system has been improved, enlarged and applied.

That the rates exacted or even demanded by carriers in interstate commerce shall be no more than reasonable and just, has thus been made certain, if anything can be made certain by legislative, judicial and executive authority. Certainly the usefulness of the power of police regulation on the subject has been exhausted, if its outside limits have not been reached.

It is upon this state of legislation, and after Congress has thus completely met and provided as far as human law can do, against the only mischief that the prohibition of all restraint upon competition can be supposed to remedy, that it is claimed that the necessity still exists for taking away from railway companies all freedom of contract, however reasonable and just, even such as is necessary to secure to the carriers the same right to reasonable charges which they are required to concede so scrupulously to the carried.

Surely an extraordinary illustration of that *public necessity* to which constitutional limitations must give way.

4. If there were no legislation whatever in restraint of rates of transportation, it still would be impossible, under the conditions that prevail, that unreasonable rates could be exacted by railroad companies. For they have been for a long time past entirely unable, in consequence of the number of roads and the excessive competition, to maintain rates that are fairly remunerative.

Statistics in the report of the Interstate Commerce Commission for December 1, 1895, show that rates of freight transportation had declined between 1865 and 1893 from 3.08 cents per ton per mile to 0.76 cents.

The total amount of reported railroad capital on June 30, 1894, was $10,796,473,813, or $62,951 per mile of line. Of this $4,834,075,659 was capital stock, while the funded debt represented by bonds and other securities was $5,356,583,019. The amount of stock paying no dividends was $3,066,150,094, or 63.43 per cent. of the total amount. The amount of bonds paying no interest was $650,573,789, or 14.17 per cent. The amount of miscellaneous obligations paying no interest was $53,426,264 or 11.71 per cent., and the amount of income bonds paying no interest was $210,757,554, or 86.94 per cent.

During the three years ending December 31, 1894, receivers were appointed for railroads having a total length of 46,875 miles, capitalized at $2,534,529,000, and 9,078 miles, capitalized at $494,821,000, were sold under foreclosure, destroying or readjusting these investments. From January 1st to July 1, 1895, these totals were increased 2,409 miles, capitalized at $149,615,000, and 2,396 miles, capitalized at $100,941,000, which respectively went into the hands of receivers, and were sold under foreclosure.

The year ending June 30, 1894, showed that the

income of railroads in a section including 52 per cent. of the railroads of the country did not produce enough above the actual cost of operation to pay their fixed charges during that year.

In the face of these figures can it be maintained that transportation rates are too high, or are in danger of becoming so? Or that an agreement designed to restrict the excessive and ruinous competition to which those results are wholly due, needs to be made a criminal conspiracy.

5. Nor is it true that even the shippers themselves are interested, in the long run, in obtaining the carriage of their goods at rates unreasonably low. They are at the same time members of the general public, and are affected, with the rest of the community, by the common embarrassment and distress. The temporary direct gain in rates unduly low is much more than offset by the ultimate indirect loss. Business, to continue profitable, must be reasonably advantageous to both sides.

And to the shippers as such, the results of an undue competition are much more injurious than profitable, in the unstable, fluctuating and uncertain rates which it never fails to produce.

This is lucidly and admirably set forth by Judge Cooley, the first chairman of the Interstate Commerce Commission, in an address before the National Convention of Railway Commissioners in 1891. And likewise in an article by Judge Schoonmaker, also a member of the Interstate Commerce Commission, published in the *Railway Review* of August 15, 1891. The official experience of these gentlemen, as well as their eminent ability and distinction, give great weight to their opinion.

The proposition that to all shippers of freight who are engaged in trade or in manufactures uniformity and stability of rates are more important than their fluctuating reduction to an occasional point un-

reasonably low, is so well established as to have become an axiom.

A dealer who has acquired or purchased a stock of goods, the cost of which depends in part upon railway rates, may be compelled at any moment to dispose of them at a loss, by an unjust reduction of those rates to a competitor, who is thereby enabled to undersell him in the market.

This is one of the mischiefs against which the Interstate Commerce Act is directed.

6. Even were further protection against unreasonable rates necessary, it cannot be maintained that the prohibition of *all* restriction upon competition, however necessary and reasonable the restriction may be, is requisite to secure it.

That involves the proposition that the freedom of just, innocent and indispensable contract in relation to property and industry can be taken away, as a means of guarding against the dangers of unjust and mischievous contracts. Those can be dealt with when they arise, and prohibited before they arise. To destroy all right of contract is not a means either necessary or justly adapted to the end of protecting the public against bad ones.

It is right to prohibit usurious contracts. But could all negotiable notes be forbidden? Although it is well known that the most facile method of usurious contract is to include the usury in the principal of such a note, and transfer it to an innocent holder.

It is right to prohibit contracts upon immoral considerations. But may all contracts by men with women be inhibited, in order to make sure that no improper agreement takes place?

The safety of foot passengers is necessary to be provided for by proper regulations. But may all vehicles be for that purpose excluded from the streets? Though, doubtless, by so doing, the lives of countless foot passengers would be saved.

These illustrations might be indefinitely extended. They would be found in every form that police regulation ever assumed. If carried far enough, that power would put an end to all business and industry, in order to prevent the evils, the accidents and the crimes that always accompany it, under whatever circumstances. The illustrations only show that the power to regulate is not the power to destroy. And that the test of every regulation must be found in its just necessity in view *of all interests concerned*, and not in its possible usefulness, looking at its purpose alone, or regarding the rights of one class of people only.

Through all the history of the common law the discrimination has been maintained between restraints of trade that were unlawful because unjust and unreasonable, and those that were lawful, because just and reasonable. There has never been the least difficulty in making and enforcing this discrimination. Never before has it been proposed in a court of justice that all contracts that tend to restrain trade in any degree may be prohibited, in order to exclude those that might restrain it unduly.

X.—It is no answer to say, as has been said, that such an Agreement as is here in question would be unnecessary if each and every company would insist for itself upon just rates, as it has a right to do. That suggestion only emphasizes the character of a statute which makes it criminal for parties to agree to do what they are to blame for not doing without an agreement, since it is necessary to their own protection.

The question is not whether the Agreement is necessary to the companies, but whether the right to make it, if they think proper, can be taken away. Freedom of contract is not limited to contracts which are necessary. It extends to all contracts, however superfluous, which are not void as against

public policy. If this one is of that character it must fail, but if not, it cannot be made unlawful because it is unnecessary. Few special contracts would be necessary if all parties concerned in the transactions to which they refer would always do right.

XI.—But such agreements between competing railway companies are in fact necessary, as has been demonstrated by long and disastrous experience.

Property once invested in a railroad cannot be withdrawn, nor can it cease to be operated without perishing. The concern must go on, and if it cannot earn what it needs, must earn what it can, until it can earn no longer. When, as is usually the case, there is not enough business for all, the competition is for existence. To expect that under such circumstances all will adhere to just rates, unless bound by some common agreement, is as idle as to suppose that in a shipwreck or a fire in a crowded building no one will attempt to save his life at the expense of due consideration for others. And whether even any common agreement can be made effectual, is the experiment which yet remains to be tried.

That all the mischiefs in the business of railway transportation that have been referred to, are the necessary results of unrestricted competition, is not only averred in the answers by statements the truth of which is conceded, but is a matter of general public knowledge, and has been clearly set forth by former members of the Commission.

They have shown from year to year in their annual reports, the great and growing evil of unrestrained and excessive competition; the difficulty of restricting it; its ruinous consequences to the railroads; its pernicious effect upon the public interest. They have habitually encouraged traffic associations like that in the present case, and declared them to be lawful, desirable and necessary.

In the request for the prosecution of this case, so far as it is to be taken to be concurred in by its members, the Commission contradict what has been their uniform position on this subject from the outset, and all that they have ever before given utterance to officially, in respect to it.

1 *Interstate Com. Rep.*, 288-653-671; 2 *Ib.*, 148-241-256; 3 *Ib.*, 23-25-41; 4 *Ib.*, 4-19-21-33; 5 *Ib.*, 263.

Judge Cooley, Railw. Rev., Ap. 26, 1884.

XII.—In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust Act, if it is held applicable to the Agreement in this case, we respectfully insist:

1. That the act deprives the defendants of both liberty and property, by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do.

That no such contract can be prohibited by law without a violation of the constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it.

And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the Legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

2. That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because

(*a.*) Those intended to be benefitted *are not the public*, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection.

(*b.*) Even if such class is held to constitute the public, it is not entitled to the suppression of *all* restriction upon competition. Because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labour and property without just compensation.

(*c.*) The legislation in question is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object, is already effectually provided for by full and careful Congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public.

(*d.*) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity. And would injure rather than benefit the very class in whose behalf it is contended for.

3. That even if it were admitted that further legislation against restrictions upon competition was both constitutional and necessary, the provisions of this act, in forbidding all such restrictions, are not justly adapted to the only end that is admissible on

the score of the public good—the maintenance of just and reasonable rates. But must result in an infringement upon the liberty and property of the defendants, to a degree far beyond what is necessary to that end, and in no way conducive to it.

And it is respectfully submitted that these propositions are undeniable; that they are the result of the whole course of decision in this Court upon the subject, and are supported by a great weight of authority elsewhere.

XIII.—The hesitation with which the Court ordinarily approaches the question of the constitutional validity of an Act of Congress, is in this case much relieved.

In most instances of that sort the intention of Congress which must be overruled if a statute is pronounced invalid, is clear and certain. Here it is the mistake or inadvertence of the legislative body which has employed language that is uncertain, and which, in the construction that has been deemed unavoidable, involves consequences that are conceded to be unjust.

It is, therefore, not the intention of Congress that is to be defeated, but its mistake, which has expressed a conclusion it could not have intended, and which one of its Houses expressly refused to adopt.

XIV.—It can hardly be necessary to remark, in conclusion, that no provisions of the Constitution, nor all its other provisions put together, are so important to be maintained, as its guarantees of life, liberty and property; for it is only to give effect to those guarantees that the Constitution itself exists. The whole framework of government, in all its departments and dependencies, has but this one pur-

pose, that life, liberty and property, in the broad definition that has been given to those words, shall be safe.

The defense of these cardinal rights, which underlie all others known to public law, is the greatest of all the functions of this highest of all tribunals, and is committed in the last resort to its hands alone. It was parliamentary oppression and folly that brought this Court into existence. Having driven the founders of our Constitution into rebellion, it taught them likewise that in a Republican system of government the fundamental rights of the citizens must be placed beyond the reach even of the representatives of the people. And this court was therefore established, to stand as a bulwark between the people and their own unadvised action, and uninstructed will.

These great guarantees of the Constitution can never be overthrown by general assault. If they are broken down, it must be by gradual approaches, in which each false and dangerous step becomes the precedent for another. And if they are to be maintained, it can only be by a timely and resolute resistance against the first attacks.

Such attacks, in various quarters and in various forms, have commenced, and until the insane delusion that prompts them has spent its force, they may be expected to continue.

In dealing with this subject the words of Chief Justice MARSHALL are appropriate: "In the argument we have been admonished of the jealousy with which the States of the Union view a revising power entrusted by the Constitution and laws of the United States to this tribunal. To observations of this character the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon us."

Tenth Point.—Whatever the merits of the agreement in question may be, no case for an injunction is presented.

I.—It has already been pointed out that no jurisdiction whatever exists under which this suit can be entertained, unless it is conferred by the Interstate Commerce Act, or the Anti-Trust Act.

And that no such jurisdiction is given by the Interstate Commerce Act

II.—While the Anti-Trust Act does confer upon the Federal courts the "jurisdiction to prevent and restrain violations of this act;" and makes it the duties of district attorneys to "institute proceedings in equity to prevent and restrain such violations;" and provides that the petition in such proceedings may pray "that such violation may be enjoined or otherwise prohibited;" these provisions do not authorize the decree sought in the present case, even assuming that the Agreement violates that Act.

1. The jurisdiction thus conferred is special, and outside of the ordinary power of the Court, and applies only to violations of the Act by which it is given. Such a violation must therefore be charged in the bill. The Act requires that the petition shall "*set forth the case*," and pray that "*such violation*" shall be enjoined. And that would be equally required by the general rules of procedure.

But the bill contains no allusion to the Anti-Trust Act, charges no violation of it, and makes no appeal to the jurisdiction it confers It proceeds upon the general ground that the Agreement is unlawful because it is in restraint of trade and com-

merce, restricts free competition, and provides for "pooling," and prays that it may therefore be declared unlawful, and enjoined.

The amendment to the bill states that the Interstate Commerce Commission applied to the Attorney-General to direct the institution of proceedings, on the ground that the agreement is in violation of the Interstate Commerce Act. And that the Attorney-General thereupon ordered suit to be commenced on that ground, and also on the ground that it violates the Anti-Trust Act. This statement does not supply the want of proper averments of the cause of action in the bill. Nor is any such method of double headed procedure authorized by either Act.

2. The provisions of the Anti-Trust Act giving the power to grant injunctions against its violation, do not dispense with the general rules of law regulating that remedy. The language implies that it is to be administered upon the settled principles always applied to it, and upon the facts always held indispensable, because no other rule or basis of proceeding is provided in the Act.

If it had been intended to invest the courts not merely with the authority to grant injunctions, but to do it upon a case to which injunctions are never applicable by the rules of law, language to that effect would have been employed, and the new ground on which the remedy was to be granted would have been prescribed.

3. In order to the granting of an injunction, it must appear that the unlawful act enjoined is not only unlawful, but such as is about to occasion an injury to the complainant, that is irreparable at law. In the present case the Government, as such, is in no danger of sustaining injury, and has no interest whatever in the matter. All the injury that can in

any event occur from the operation of this Agreement, if it is assumed to be injurious at all, will be to such shippers of freight as may hereafter be affected by it, by being overcharged. If it be held that under the terms of the Act the Government may intervene by suit upon the ground of the injury that may be occasioned to such parties, then, to justify an injunction, the special case of some party must be set forth, who shall appear to be in danger of an irreparable injury.

Such a case could only arise under very special circumstances, because no injury to any shipper, by excess of charge, can be easily conceived, for which the remedy under the provisions of the 7th Section of the Anti-Trust Act (if that Act be applicable), whereby he may recover threefold damages, and likewise the various remedies given by the Interstate Commerce Act, are not ample and complete. But if a case that justifies an injunction has in fact arisen, it should be stated in the bill.

In the case of the *Texas Pacific Railroad Co.*, before cited, this Court remarks with severity upon the theory of the administration of justice through the Commission, by proclamation, instead of by the adjudication of actual cases as they occur. The opinion is most instructive and pertinent. The Court intimates very plainly that cases must be considered on their own circumstances when they arise, and cannot be dealt with by vague general orders in advance, in which the circumstances that give character to cases are disregarded, and the just and unjust are blended together in a common misapplication.

Eleventh Point.—Even though the authority to make the decree sought exists, the bill is insufficient to invoke it.

It has already been shown that it is not based by

its averments on the Anti-Trust Act. That is equally true in respect to the Interstate Commerce Act.

If judged by its allegations, it sets forth only the charge that the Agreement is void at common law. But as its effect is now claimed on the part of the Government, it avers not only this, but that the Agreement violates both these statutes.

If the bill is allowed to have a scope by construction or inference that its language does not warrant, so that a penal statute may thus be proceeded upon without disclosing that cause of action in the complaint, then the bill is fatally defective for misjoinder and multifariousness. For it then sets up three distinct and different causes of action, two of which arise under separate statutes, each creating a right of action that would not otherwise exist, and claimed to confer a special jurisdiction to enforce it. And the third arises, if at all, at common law, and appeals for its redress to the general jurisdiction of the Court.

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant."

Story's Eq. Pleading, sec. 271.

"To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: first, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient, as stated, to sustain a bill."

Ib., sec. 271*a*—*note.*

"Perhaps in strictness of language it would be more correct to call it a misjoinder, where different and distinct claims are mixed up in the same bill against the same defendant."

Ib., note to sec. 271.

Campbell v. *Mackay*, 1 *Myl. & Cr.*, 618.

This objection is taken in the answers.

Record, fols. 272–275.

Ib., fols. 380–383.

It could not have been taken by demurrer, because it is not apparent on the face of the bill, the form of which, in respect to its alleged common law cause of action, is sufficient.

An ambiguous bill will not receive a construction that will make it multifarious, where it can be avoided. But if such construction is claimed for it by the complainant and is admitted, the objection arises and is fatal.

This defect is not technical merely. It goes to the substance of the bill, introduces inconvenience and confusion of procedure, and is a serious injustice and disadvantage to the defendants.

Orderly procedure, in accordance with established rules, is essential to justice.

E. J. PHELPS,
Of Counsel for the N. Y. Cen. & Hud. Riv. R. Co.

IN THE SUPREME COURT OF THE UNITED STATES.

The United States, Complainant,
vs.
The Joint Traffic Association et al.

October Term, 1897.
No. 341.

CONDENSED STATEMENT OF THE ORAL ARGUMENT OF MR. GEORGE F. EDMUNDS ON THE TWENTY-FIFTH DAY OF FEBRUARY, 1898.

Before the agreement in question was made the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation.

This is admitted by pleadings.

This being true, these rates could not have been either raised or lowered, under then existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations, as follows:—

(1) To aid in fulfilling the purposes of the Interstate Commerce Act; to co-operate

(2) with each other and adjacent transportation associations to establish and maintain

(3) reasonable and just rates, fares, rules, and regulations on State and interstate traffic; to

(4) prevent unjust discrimination, and to secure the reduction and concentration of agencies

(5) and the introduction of economies in the conduct of the freight and passenger service. (Record, page 17.)

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other purpose, and no secret or covert design in respect of the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract. I have pointed out the grounds on which this contention rests in my brief, and need not enlarge upon them.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named." (Record, pages 18, 19.)

The first six articles of the contract provide for organization and administration (Record, pages 19–27), in respect of which no criticism has been suggested, except as to section 5 of Article V. (Record, page 26), in connection with the Solicitor-General's contention in regard to Article VII. (Record page 27).

Article VII. is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law, it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides:—

"SECTION 1. The duly published schedules of rates, fares, and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto." (Record, page 27.)

This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the pre-existing just, reasonable, and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor-General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason, and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the Act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or any sense whatever. In the instance of this first provision of the agreement, they have engaged to do that very thing and that very thing only in the form of specific language referring to a specific and existing just, reasonable, and lawful state of things which they were then acting upon.

The second section of Article VII. (Record, page 28) is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer

to this is that the pleadings distinctly admit that there was no evasive intention, or other unjust purpose, in any part of the arrangement. It is, therefore, not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this section, it is sufficient to say that the very next section of the same article declares that

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers, as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce Act, or any other law, and so forth; and it commands the managers to co-operate to these ends with the Interstate Commerce Commission.

When the managers come to act, then, under these powers, how do they start? They start with a system of rates established, not by the agreement, but before it was made, and confirmed by the agreement, which were confessedly in conformity with and in promotion of the Commerce Act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the second section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all, and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned contained in the Commerce Act. Can this be an authority to restrain trade under any definition of the word restraint? The

only restraint is a restraint against a violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce Act. If we assume that the restraint of trade mentioned in the Trust Act may be a restraint of innocent and just proceeding, can any one maintain that it makes illegal an agreement not to violate law, but to obey it?

It was obvious when this agreement was made that rates then existing and being in all particulars reasonable and equal, might, in the course of changes in production, trade, and under other conditions over which the railways could have no control, become unjust, unreasonable, and inapplicable to the new conditions, and that in such case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice, and law should require under such conditions. It was to provide for this that sections 2 and 3 of the seventh article were inserted. As I have said, they were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable, and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbiddden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company, or any number of companies affected, could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But it is asked, would not the road thus refusing be subjected to the fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could com-

pel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce Act itself in terms requires the same reasonable and just conduct by railways towards each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of Article VII. is perfectly valid under any possible construction of the language of the Trust Act, as well as in perfect conformity with and in aid of the Commerce Act.

I may as well here compare the provisions of Article VII., which contains the great leading feature of the whole agreement, with the agreement in the Trans-Missouri case. The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in the first section of Article VII. had already been independently established, were, in fact, reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission, and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interests of the country. It was an engagement to stand by that state of things and for the express purpose of continuing that happy state of things—exactly those that the law requires—that this engagement was made. Turn now to the Trans-Missouri agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, &c.; and, in the very words of the agreement, for the purpose of mutual protection, and for nothing else.

The Trans-Missouri agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and did not, evidently, intend to impose the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties

themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping up and increasing rates, instead of for the purpose (as in the Joint Traffic agreement) of keeping them just and in conformity with law, whether by reduction, increase, or other readjustment.

Other essential differences are stated in my brief which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a co-operative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the Trans-Missouri case alleged—there being, it will be remembered, no previously established rates that were agreed upon—that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated on page 34 of my brief. The practical construction by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts.

The next principal contention of my learned brother is that Article VIII. of the agreement violates the Trust Act by restraining trade.

The words of the article are as follows:—

"ARTICLE VIII.

"PROPORTIONS OF COMPETITIVE TRAFFIC.

"The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done." (Record, page 29.)

This article provides that the managers shall endeavor so far, and so far only, as obedience to law—that is to say, conformity with the Commerce Act and conformity with the Trust

Act—would permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is a sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than as the law shall permit. If, therefore, the Trust Act condemns the effort referred to, then not to make the effort. If the Interstate Commerce Act, either in terms or spirit, is adverse to such an effort the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads, passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads were necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the eighth article then, I submit, was wholesome, lawful, and necessary, and it was the very thing that one of the clauses in the Commerce Act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a re-

straint of trade, in one sense or another. It will be seen on examining the agreement that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the association. (Record, pages 28, 34, 35.) This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can be established that the thirty days' notice was too long. It is a matter of history that when the Commerce Act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce Act for notice was much too short, and that unjust inequalities have arisen, again and again, from changes in rates by particular roads on such short notice that favored customers and favored localities, &c., would get advantages over others, in violation of the spirit and substance of the Commerce Act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads, and all communities, that this period of thirty days instead of ten was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as it regards the provision I have just spoken of, as well as it regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support of and in promotion of trade. Trade is a general word, and its operations, like all other operations that require cooperating and associating forces and arrangement, are ad-

vanced by, and indeed, cannot be carried on truly and honestly for public interests without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain but advance and promote the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics, the safety valve of a locomotive, with its counterweight, regulates and restrains, or gives off, the accumulating steam in the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of the trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it, even as an incident. Wherever it is practiced, it is practiced apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various important points to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one State to another.

I refrain from making any observations on the constitutional question arising if the Trust Act is to be construed as forbidding innocent contracts promotive of public policy, which I have in-

sisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter will be left entirely to my brother Mr. Phelps.

In respect of the meaning of the words of the Trust Act, I beg to ask your Honor's careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and, second, to the citations I have made from law writers, showing a distinct and separate classification of the two phrases, restraint of trade in general and partial restraint of trade. If these writers are correct (as nobody doubts, I think, they are), and the two phrases were known and treated in the law at the time of the passage of the Act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the Act shall be assigned to the first class, and not carried over into the second.

I have thus alluded to the larger part of the points made in my printed brief, and as I have occupied my full share of the time, I will conclude by stating that I insist upon all the points stated in the brief, and will ask the court to consider them.

GEORGE F. EDMUNDS.

NOTE.—As no report was taken of my oral argument, I have been only able, imperfectly, to reproduce its principal parts in this condensed form, and, possibly, not in the order in which the argument was orally made.

G. F. E.

171 505
L-ed 259
175 228

UNITED STATES v. JOINT TRAFFIC ASSOCIATION.

171 505 171 505
L-ed 259 L-ed 259
99 f 61 182 280
179 297

171 505
L-ed 259
105 f 105

171 505
L-ed 259
110 f 696

171 505
43 L-ed 259
186 92
115 f 619
115 f 622

171 505
43 L-ed 259
s 19 SC 25
188 359

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 84. Argued February 24, 25, 1898. — Decided October 24, 1898.

Thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the Joint Traffic Association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western termini of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest therein over its own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should coöperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were authorized in order to pay expenses, and the agreement was to take effect January 1, 1896, and to continue in existence for five years. The bill, filed on behalf of the United States, sought a judgment declaring that agreement void. *Held*,

(1) That upon comparing this agreement with the one set forth in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the similarity between them suggests that a similar result should be reached in the two cases, as the point now taken was urged in that case, and was then intentionally and necessarily decided;

(2) That so far as the establishment of rates and fares is concerned there is no substantial difference between this agreement and the one set forth in the *Trans-Missouri case*;

(3) That Congress, with regard to interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce, by shutting out the operation of the general law of competition.

THE bill was filed in this case in the Circuit Court of the United States for the Southern District of New York for the purpose of obtaining an adjudication that an agreement

entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution.

These railroad companies formed most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast, and the object of the agreement, as expressed in its preamble, was to form an association of railroad companies "to aid in fulfilling the purpose of the Interstate Commerce act, to coöperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." To accomplish these purposes the railroad companies adopted articles of association, by which they agreed that the affairs of the association should be administered by several different boards, and that it should have jurisdiction over all competitive traffic (with certain exceptions therein noted) which passed through the western termini of the trunk lines (naming them), and such other points as might be thereafter designated by the managers. The duly published schedules of rates, fares and charges, and the rules applicable thereto, which were in force at the time of the execution of the agreement and authorized by the different companies and filed with the Interstate Commerce Commission, were reaffirmed by the companies composing the association. From time to time the managers were to recommend such changes in the rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic covered by the agreement and for protecting the interests of the parties to the agreement, and a failure to observe such recommendations by any of the parties to the agreement was to be deemed a violation of the agreement. No company which was a party to it was permitted in any way to deviate from or to change the rates, fares, charges or rules set forth in the agreement or recommended by the managers, except by a resolution of the board of directors of the company, and its action was not to affect the rates, etc., disapproved, except to the ex-

tent of its interest therein over its own road. A copy of such resolution of the board of any company authorizing a change of rates or fares, etc., was to be immediately forwarded by the company making the same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon the receipt of such resolution the managers were "to act promptly upon the same for the protection of the parties hereto." It was further stated in the agreement that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

One provision of the agreement was to the effect that the managers were charged with the duty of securing to each company which was a party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as it could be legally done. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which might decline or fail to observe the rates, etc., established under it, and the interests of parties injuriously affected by such action of the managers were to be accorded reasonable protection in so far as the managers could reasonably do so. When in the judgment of the managers it was necessary to the purposes of the agreement, they might determine the divisions of rates and fares between connecting companies who were parties to the agreement and connections not parties thereto, keeping in view uniformity and the equities involved.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be so arranged as to give proper representation to each company party to the agreement. Soliciting or contracting passenger or freight agencies were not to be maintained by the companies, except

with the approval of the managers, and no one that the managers decided to be objectionable was to be employed or continued in an agency. The officials and employés of any of the companies could be examined, and an investigation made when, in the judgment of the managers, their information or any complaint might so warrant. Any violation of the agreement was to be followed by a forfeiture of the offending company in a sum to be determined by the managers, which should not exceed five thousand dollars, or if the gross receipts of the transaction which violated the agreement should exceed five thousand dollars, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such gross receipts. The sums thus collected were to go to the payment of the expenses of the association, except that the offending company should not participate in the application of its own forfeiture.

The agreement also provided for assessments upon the companies in order to pay the expenses of the association, and also for the appointment of commissioners and abitrators who were to decide matters coming before them. No one retiring from the agreement before the time fixed for its final completion, except by the unanimous consent of the parties, should be entitled to any refund from the residue of the deposits remaining at the close of the agreement.

It was to take effect January 1, 1896, and to continue in existence five years, after which any company could retire upon giving ninety days' written notice of its desire to do so.

The bill filed by the Government contained allegations showing that all the defendant railroad companies were common carriers duly incorporated by the several States through which they passed, and that they were engaged as such carriers in the transportation of freight and passengers, separately or in connection with each other, in trade and commerce continuously carried on among the several States of the Union and between the several States and the Territories thereof. The bill also charged that the defendants, unlawfully intending to restrain commerce among the several States and to prevent competition among the railroads named, in respect to all their

interstate commerce, entered into the agreement referred to above, and it charged that the agreement was an unlawful one, and a combination and conspiracy, and that it was entered into in order to terminate all competition among the parties to it for freight and passenger traffic, and that the agreement unlawfully restrained trade and commerce among the several States and Territories of the United States, and unlawfully attempted to monopolize a part of such interstate trade and commerce. The bill ended with the allegation that the companies were preparing to put into full operation all the provisions of the agreement, and the relief sought was a judgment declaring the agreement void and enjoining the parties from operating their roads under the same. The defendant, the Joint Traffic Association, filed an answer (the other defendants substantially adopting it), which admitted the making of the contract, but denied its invalidity or that it is or was intended to be an unlawful contract, combination or conspiracy to restrain trade or commerce, or that it was an attempt to monopolize the same, or that it was intended to restrain or prevent legitimate competition among the railroads which were parties to the agreement. The answer, in brief, denied all allegations of unlawful acts or of an unlawful intent, unless the making of the agreement itself was an unlawful act. The answer then set forth in quite lengthy terms a general history of the condition of the railroad traffic among the various railroads which were parties to the agreement at the time it was entered into, and alleged the necessity of some such agreement in order to the harmonious operation of the different roads, and that it was necessary as well to the public as to the railroads themselves.

The case came on for hearing on bill and answer, and the Circuit Court, after a hearing, dismissed the bill, and upon appeal its decree was affirmed by the Circuit Court of Appeals for the Second Circuit, and the Government has appealed here.

Mr. Solicitor General for appellants.

The agreement violates the anti-trust law, because it creates an association of competing trunk line systems, to which is

given jurisdiction over competitive interstate traffic, with power, through a central authority, aided by a skilful scheme of restrictions, regulations and penalties, to establish and maintain rates and fares on such traffic and prevent competition, thus constituting a contract in restraint of trade or commerce among the several States, as defined by this court in the *Trans-Missouri case*, 166 U. S. 290.

That case was elaborately argued and carefully considered. A petition for a rehearing was presented and denied. The decision has been accepted and acted upon by the Departments of the Government, and by the courts, both state and Federal, as definitively settling the meaning and scope of the anti-trust law when applied to traffic associations among competing interstate railway systems. The decision was not only a just, but an eminently salutary one. I shall not concede that the principles it laid down remain questionable. I shall not admit that it is necessary for me, by argument, to fortify the position taken by this court in that case. The anti-trust law, as there construed, is the law of the land.

The wisdom of Congress in prohibiting *all* agreements in restraint of trade among interstate railway systems is even more manifest now than when the *Trans-Missouri case* was decided. At the time of the argument of the *Trans-Missouri case*, it was still to some extent a mooted question whether the Interstate Commerce Commission was empowered to determine what are fair and reasonable rates, and to enforce such rates. This question is no longer open. *Interstate Commerce Commission* v. *N. O. & Tex. Pac. Railway*, 167 U. S. 479; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144.

If it be urged that any illegality in the agreement is cured by section 3 of article 7, providing that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uni-

formity in the rates, fares, charges and rules established hereunder."

An injunction to construe and exercise powers conferred so as to permit no violation of law, is an admission that the powers may be so construed and exercised as to violate law. If the anti-trust law prohibited only those contracts in unreasonable restraint of trade or commerce there might be saving force in this section. But the anti-trust law prohibits *all* contracts in restraint of trade or commerce. Whether the rates be reasonable or unreasonable, an agreement providing for their establishment and maintenance by an association of interstate railways, is prohibited. The managers can exercise none of the essential powers conferred by the agreement without violating the law. In the matter of the essential powers, it is not a question of method or degree; the powers cannot be exercised, because they are in themselves illegal. The association itself is illegal. It is formed for the purpose of controlling certain competitive traffic. The central authority — the managers — is given the power to establish and maintain rates on that traffic. Take away from the association the power to establish and maintain rates, and it immediately falls to pieces. It ceases to have a *raison d'être*.

The authority of the Government to maintain this suit is sustained in *United States* v. *Freight Association*, 166 U. S. 290, 343, citing *in re Debs*, 158 U. S. 564; *Cincinnati, New Orleans, &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197.

Mr. James C. Carter (with whom was *Mr. Lewis Cass Ledyard* on the brief), for The Joint Traffic Association, appellee.

There are certain observations in relation to the Anti-Trust act which are properly to be made before proceeding to the argument.

There is no doubt that prior to and at the time of the pas-

sage of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited, in some minds, much alarm. Many industries were seen, or supposed, to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of "trusts," and this term came to be employed, in a general way, to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be a rather reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield a greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends and, perhaps, the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed themselves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a "trust" to be legally defined so that a prohibition of it should not include a prohibition of

the exercise of the clearest constitutional rights? Congress, surely, could not prevent the creation of corporations under state laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of States. And was it certain that these so called trusts were, in every instance, necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts," or limit aggregations of capital in any form. The general charge was that these combinations were in some form monopolies, and in restraint of trade, but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies, or restraints upon trade, they should be prohibited from so doing in the future; and this is what Congress did and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined, are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

The first question we design to consider is whether the agreement violates any of the provisions of the act referred to. To this end it is of much importance to have in mind the particular nature of the subject with which this act deals, and how that subject has heretofore been treated in law and legislation.

It is immediately obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

We next observe that it is not contracts only of a certain character which are condemned, but that they are coupled together with certain other acts, presumably of a similar nature or tendency, namely, combinations or conspiracies in restraint of trade, and monopolies, or combinations or conspiracies to monopolize. Contracts, therefore, are dealt with, not so much as contracts, but as one form of acts relating to trade and commerce assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to a sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy upon which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way in which they are treated in the law. One description embraces simply ordinary business transactions, where parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar instances of this character.

Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs therefore to the law of contracts, and the treatises on that law usually embrace a chapter devoted to it.

But there is another and much smaller description of contracts supposed to be injurious to trade of quite a different character. They are not, properly speaking, business transactions. They do not involve the sale, leasing or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a common interest, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers, or employers, unite, in the form of agreement, to regulate hours of labor, or prices, or where merchants, or tradesmen, combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to suppress, or regulate, competition among themselves; or where a class of producers or dealers combine together to control a product, or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

The marked distinction between these cases and the ordinary business transactions first spoken of is, that in the latter there is a difference of interest, sometimes regarded as a hostility of interest between the parties, each seeking to gain the utmost from the other; whereas, in the former, the parties are in the same interest, each seeking the same end. The term "contract" does not well express this sort of agreement. It is a uniting together for a common purpose — a combination — or, when thought to be of an objectionable character, a conspiracy. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but, in giving it this name we should not lose sight of its real character. In reality it is simply an act, and innocent, or guilty, according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for repression, it is not enough to simply declare it illegal. The practice may, nevertheless, be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which law usually takes in respect to such so called contracts is in the form of prohibition and penalty, and the subject belongs not to the law of contracts, but to the criminal law, where it is usually dealt with under the head of conspiracy.

We do not mean by the above observations that there may not be instances which partake, to a greater or less degree, of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust act belongs, is manifestly the one last described. The circumstance that contracts are grouped together with combinations and conspiracies and made the subject of criminal treatment, shows this very plainly.

The ineptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to

reach that class of supposed mischiefs which flow from combinations. But the great bulk of the cases, probably nine tenths, in which courts have felt called upon to say anything about contracts in restraint of trade, has been the business transactions first alluded to in which an agreement has been entered into, not to exercise a particular calling, as where the keeper of a well-patronized tavern sells out his establishment and good will, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but, surely even when void, there was nothing about them calling for the intervention of the criminal law. And yet this statute bunches the valid and the void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed, would be, assuming that the act covers contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were, in fact, in restraint of trade or commerce between the States. That it is, in fact, in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this court, and we expect to be able to show that the agreement is not only not in restraint of trade and commerce, but highly beneficial to both; that Congress has never declared, or intended to declare, it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objection on constitutional grounds, which will be dealt with by other counsel.

Having presented this preliminary matter, *Mr. Carter* argued the following points.

I. The court has no jurisdiction to entertain this suit, unless it can be found in the provisions of some statute.

The bill sets forth simply the commission of a misdemeanor,

and an intention on the part of the defendants to repeat the offence. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary courts of common law, is sufficient for the repression of crime, and exclusive adhesion to it necessary for the protection of the citizen.

II. The Anti-Trust act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and, perhaps, the decision made by this court in the suit of the *United States* v. *The Trans-Missouri Freight Association*, should be regarded as a determination that the Attorney General was at liberty in case of any violation of the provisions of the act to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition, in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication, at least, it is withheld; for in certain cases specially mentioned in sections 6 and 13, jurisdiction is expressly given to courts of equity to grant injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. "*Expressio unius est exclusio alterius.*"

III. A clear understanding should be had at the outset, of the meaning of the terms with which we are dealing. The class of contracts condemned by the Anti-Trust act is defined by the effect they have upon trade or commerce. They are such, and such only, as have the effect of restraining trade or commerce. The actual effect which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

This may seem self-evident, and indeed is so. But the possible suggestion might be made that there is a class of contracts, called, or named, "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect. There is no foundation for such a suggestion. There

is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever, heretofore, the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined by an inquiry as to its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might, or might not, be called or styled a contract in restraint of trade.

Moreover we are dealing with the criminal law, which never classes acts and makes them punishable under arbitrary names, without regard to their supposed effects, as being actually mischievous or otherwise. This would be putting innocence on a par with guilt.

IV. There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To restrain is to hold back, to check, to prevent, and thus to diminish. It is injury to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract injures and thus diminishes, or tends to diminish, trade or commerce, it cannot be deemed as in restraint of trade or commerce.

V. The agreement under which The Joint Traffic Association was formed, and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the act of July 2, 1890.

[Over one hundred pages of appellant's brief are taken up with the discussion of this point. The following synopsis of its reasoning was filed by counsel.]

The bulk of the whole discussion, so far as respects the Anti-Trust act, is contained under this Fifth Point, and the line of argument pursued is substantially as follows: (1) That no restraint is directly, or in terms, imposed upon trade or commerce; that all the members of the association will, as the agreement assumes, continue in business, doing the utmost they can, and in competition with each other; that whatever restraint is imposed by it is imposed simply upon a single feature of this competition; that, competition and trade not being identical with each other, a restraint upon competition is not necessarily a restraint upon trade. It is admitted, how-

ever, that a restraint upon competition may be a restraint upon trade; but it is asserted that whether it is so or not, in any particular case, depends upon the nature and effect of the restraint imposed in such case.

(2) The argument thus reaches one of the main subjects of discussion, namely, what the effects of competition in trade are; when they are good, and when, if ever, they are bad; and how such restraints have been regarded in public economy, law and legislation. This subject is treated at first generally, without reference to the particular effects of competition in the business of railroad transportation.

(3) It is then pointed out that the particular field of discussion in the case has been, by what precedes, fully disclosed, namely, the effects of restraints upon competition as restraining, or not restraining, trade and commerce, and a particular proposition, substantially equivalent to the main one, is stated as follows:

"The agreement in question, as a whole, and, particularly, so much of it as affects competition, is in the highest degree promotive of trade and commerce." The discussion on this head pursues the following course:

(*a*) It begins with a statement of "the origin, development and present condition in this country of the business of railway transportation," and shows that by the deliberate policy of all our governments, state and National, business has been, from the first, subjected to the severest involuntary competition, and it points out the ruinous results to which such competition leads when it takes place on rates, and aims to show that such results can be arrested, or mitigated, only by allowing the competing parties to displace the strife by some form of agreement. (*b*) This discussion is proceeded with by pointing out what the main requisites of a good railway service are, and how they are affected by railway competition in rates. It aims to show that such competition, by making uniformity in rates impossible, makes it impossible to secure any of these essential requisites, and that they can be secured only by some form of concerted agreement between the parties.

(4) The subject of agreements between railway companies and coöperative traffic associations being thus reached, a sketch is made of their origin and development down to the time of the passage of the Interstate Commerce law, and it is shown that the most efficacious form of agreement down to that time had been found to be that of pooling.

(5) The Interstate Commerce law and its effects are then discussed, and it is shown that one of its main objects was to bring about, so far as Federal legislation could accomplish it, uniformity in rates, and thus put an end to the practice of discrimination, and attention is called to the incidental feature of the law which prohibited pooling agreements. It is then shown that the effect of that law was to increase and aggravate the very evils which it was designed to remove. Pooling being prohibited, the most effective method for securing uniformity in rates could no longer be employed, and ruinous competition, with every form of discrimination, followed, and to these evils was added the unendurable aggravation that the practices which the law could not prevent were, nevertheless, converted into crimes.

(6) It is then shown that the necessity was universally felt for some form of concerted action which would put an end to these deplorable conditions and that the present agreement was the result of an earnest effort in this direction.

(7) An analysis of the agreement is then made, and it is pointed out that it is not aimed against competition in general, but assumes that such competition will still continue actively and earnestly on every point except that of rates.

Its precise effect upon competition in rates is dealt with, and it is shown that while its object is to secure uniformity in rates by inducing competing companies to consent to such uniformity, it does not purport to require it or compel it. That it does not really, or in any proper sense, seek to restrain competition at all, but aims to render competition open, honest and lawful, so that the business of railway transportation may be conducted in conformity with the requirements of the Interstate Commerce law, and without the daily commission of crime. It shows that, to this end, it is necessary that each railroad

company should first establish its rates and should adhere to them for a reasonable period, which is fixed at thirty days, in order if it intends a change that it may give reasonable notice of its intention in time to enable the competing parties to meet it, and to shape their own conduct accordingly; that this is absolutely the only restraint upon competition effected by the agreement, and being only slight and temporary, and necessary in order to enable competition to be open and lawful, cannot be regarded as a restraint upon trade. It admits that one of its main objects is to secure what the Interstate Commerce law sought to secure, uniformity in rates, but its method of effecting that result is, not by a compulsory agreement, but by taking away the motives to ruinous, secret and unlawful competition in rates. It also points out the many other beneficial provisions of the agreement by which it is sought to make the railroad transportation of the country regular, orderly, safe and effective.

(8) It further seeks to emphasize the beneficial purposes of the agreement by showing that every great industry in which the coöperation of many different proprietors and agencies is required, necessarily calls for a system of regulation which must be supplied either by the action of government, or, in the absence of such action, by the voluntary action of those who are engaged in it, and it pronounces the association as "an institution for the regulation of transportation business in those respects in which the State, either from lack of jurisdiction, or because it deems that the regulation could be best devised and administered by the railroad systems themselves, has chosen not to regulate it."

(9) Throughout this part of the argument the central proposition is that of the absolute necessity for some agency by which uniformity in rates may be brought about, and a uniformity not only in the case of merchandise shipped from the same point to the same terminus, but also in the case of merchandise shipped from, or to, any points in any way competing. So long as competition in rates exists different men and different places will necessarily be put up, or pulled down, enriched or ruined, as one railroad company may think it to be

for its interest to make lower rates than another, and without regard to comparative skill, industry or other natural advantages which furnish the true and only field for useful competition. Railway transportation is a public function, and absolute neutrality in relation to the multitudinous competitions of life is an essential condition of its just discharge. This neutrality can be secured only by uniformity in rates. If this is not secured by Government it must be brought about by some private agency. It cannot be secured by governmental action, because the Government has committed the business to private hands. The Interstate Commerce law had this uniformity for its prime object; and went to the limit of Congressional power in the effort to accomplish it. The prime object of the present agreement is to supplement the effort, not by compulsorily restricting competition, but by taking away the motives to it. It is asked whether it is possible to regard an organization formed to effect an object which the law and public policy unite in viewing as essential, but which Congress cannot by law reach, as a restraint upon trade? It is believed that when this single subject is considered in all its various relations, it is, of itself alone, decisive of the whole controversy.

(10) The important matter of the classification of freight is taken up and considered, and it is shown that the great end of uniformity in rates cannot be attained without a system of classification; that classification is only a part, although a necessary part, of rate making; that its only object and purpose is to make uniformity in rates possible; that it has never been attempted, except as part of an effort to bring about such uniformity, and can never be perfected, or even preserved, except upon the condition of such uniformity.

(11) The general usefulness of the organization formed by the association is dwelt upon by calling attention to the multitude and variety of subjects upon which it is daily engaged, and especially to its constant occupation with the question, how any particular rates which may happen to have been established, or which may be proposed to be established, affect different places and different merchants or manufacturers en-

gaged in the same business, and who are in competition with each other, whether they may be a few miles or hundreds of miles apart. It is asserted that the association becomes the practical arbitrator in cases where the Interstate Commerce law cannot operate between competing merchants and manufacturers, and between competing places, as to what rates even-handed justice to all requires; that from the nature of the case and the interest of the railroads themselves, no rules can be adopted for decision of such questions except those of justice and equality, and that it is practically impossible that it should be made a medium of monopoly, or for the exaction of anything more than reasonable charges; and that this is proved by a reference to the course of railroad charges during the whole period, embracing many years, in which such agreements have existed, the fact being that they have continually declined from the rate of about three cents a ton or mile to less than one cent a ton or mile, a rate lower than that of railway transportation in any other quarter of the world.

(12) The argument then refers to the matters of fact which were involved or assumed in the foregoing discussion, and justifies whatever assumptions have been made in the following ways: (*a*) That, by the very nature of the case, they are matters which must necessarily be true, because they are the results of the operation of the familiar and well-known laws relating to industrial pursuits. (*b*) Because they have that notoriety which requires a court to take judicial notice of them. (*c*) Because they are fully established by averments in the answer admitted by the appellant in setting down the cause for hearing upon bill and answer. (*d*) By the declarations, repeated in multiplied forms, of the Interstate Commerce Commission, the great public agency which has such supervision and control over the business of railway transportation as Congress can assert. Copious extracts from these declarations are set forth.

(13) These extracts and other proofs thus referred to are again declared to stamp this association as one instance, of which industrial life furnishes a multitude, where industrial

interests of great magnitude are subjected to private regulation, and for the reason that the State recognizes, and always has recognized, the fact that such regulation is far more effective over a large range of subjects than any which the State itself could devise and enforce. This statement is confirmed and illustrated by reference to many different instances. (*a*) To the multitudinous associations among workmen and employés of various descriptions, all based upon agreements far more in restraint of competition than any contained in this instrument. (*b*) Similar unions among the employers of labor. (*c*) To the numerous Commercial, Stock and Produce Exchanges and Boards of Trade, all of which prescribe rates of commission and for compensation for various services, and forbid any departure from them, and are far more restrictive of competition than any provision in the agreement in question.

(14) The question is submitted whether trade is in any way restrained by the agreements between laborers and employés, or those between the employers of labor, and it is answered by saying that the final and general results, notwithstanding occasional abuses, are greatly to increase the efficiency of labor and the amount of work done, and to elevate the character of the laboring classes. The same question is asked in respect to Commercial Exchanges and Boards of Trade, whether they restrain the business with which they are conducted, whether there is less buying or selling of goods in consequence of commissions or other charges being fixed at particular sums. It is answered by saying that, as every one knows, these are all agencies by which the number and magnitude of business transactions is enormously increased.

The same question is put in relation to the operation of the present agreement, or of any agreement tending to secure uniformity in railroad rates and the stability, certainty and safety of railway transportation; and it is asked whether, in consequence of such agreements, the business of railway transportation or the exchange of commodities is in any particular diminished, and whether it is not, on the contrary, prodigiously extended and enlarged.

(15) Under general subdivision V the conclusion to which the foregoing line of argument leads is drawn in these words: "That the agreement which this action seeks to condemn is not by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce, but is on the contrary highly needful to, and promotive of, both."

Its necessity to beneficial purposes, as thus established, is then separately pointed out by way of summing up: (*a*) Its necessity to stability in rates. (*b*) Its necessity to uniformity in rates and to prevent unjust discrimination. (*c*) Its necessity to secure the general benefits of harmonious coöperation in classification and interchange of traffic. (*d*) Its necessity as a supplement to the Interstate Commerce act, and in order to make the objects of that act attainable. (*e*) Its necessity for the prevention of crime, for its punishment when committed, and for the prevention of perjury, committed in order to conceal crime.

VI. If the Anti-Trust act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow. (1) That all railroad transportation be abandoned; or, (2) The consolidation of all competing railroads under a single ownership, either governmental or private; or, (3) That all competing railroad business must be carried on in constant and daily violation of criminal law. Of these alternatives neither the first or the second can be contemplated as possible. Railroad transportation cannot be abandoned, and no governmental ownership can, under present, or any probably near future conditions, be brought about. We have no sovereign government possessing the requisite powers. It is the third alternative which must follow.

VII. These positions are fully supported by the weight of authority.

VIII. The agreement is in no manner in violation of the provisions of the second section of the act. It creates no monopoly, nor is it an attempt, or conspiracy to monopolize.

IX. In the attempt, made by the bill, to array every possible objection to the agreement, there is an evident purpose to

suggest that its eighth article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of section 5 of the Interstate Commerce act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce law.

Mr. E. J. Phelps for the New York Central and Hudson River Railroad Company, appellee.

I. As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken as true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill. The facts on which the case stands are therefore to be found exclusively in the answers, either in the admissions or in the responsive averments which they contain.

II. The denials in the answers completely negative all the charges of illegal intent on the part of the defendants which are contained in the bill, unless they are found to result necessarily from the terms of the agreement itself.

III. Whether the agreement by its terms violates the Federal law, depends entirely on the inquiry whether it conflicts with any statute of the United States. The bill is not based upon any statute, but proceeds apparently upon common law grounds. No statute is referred to, or charged to have been violated.

IV. The only statutes of the United States that are claimed to be infringed by the terms of the agreement, are the Interstate Commerce act, of February 4, 1887, amended by acts of March 2, 1889, February 10, 1891, and February 8, 1895, and the Anti-Trust act of July 2, 1890.

V. The agreement violates no provision of the Interstate Commerce act. The only provision in that act that is claimed to be infringed, is contained in § 5, which prohibits "pooling." "Pooling" means a division of the money earnings of traffic, which this article does not contemplate.

VI. Even assuming that this clause in the agreement can be construed into a violation of the 5th section of the Interstate Commerce act, this suit would not be maintainable, be-

cause it is unauthorized by that act, and precluded by its express provisions. This court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States Government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offence; unless such power is specially conferred by statute. No such power is granted.

VII. The Anti-Trust act of July 2, 1890, does not apply to the business of railway transportation. It will be claimed that the decision of this court in the case of the *Trans-Missouri Association*, 166 U. S. 290, is decisive upon this point, as well as upon the further question whether the agreement here under consideration is a violation of the provisions of the Anti-Trust act. It will be found on comparison that very material differences exist between the agreement shown in that case, and the case that is presented here. So that the decision there is by no means controlling in the present case. These points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated. But we conceive it not to be improper, so far as it may be necessary, respectfully to ask of the court a reconsideration of the conclusions reached by the majority of the judges in that decision, which overrules the judgment of six United States Circuit and District Judges who sat in the different stages of that case and this.

The argument in opposition to it has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it, nor is it necessary to repeat it.

VIII. Assuming for the purposes of the argument, that the Anti-Trust law does apply to railway traffic contracts, no provision of that law is violated by the agreement now under consideration.

The prohibitions of the act are two: 1. Against contracts, combinations or conspiracies in restraint of trade or commerce. 2. The monopoly of, or the attempt or combination to monopolize any part of the trade or commerce of the States, or with foreign nations.

Mr. Phelps' Argument for the New York Central Railroad Company.

The agreement in this case is not "in restraint of trade or commerce." The theory of the bill appears to be that the agreement comes within this description, because it tends to restrict competition, and because any agreement that restrains competition is "in restraint of trade." Both these assumptions are erroneous, the one in fact, the other in law. The agreement does not restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

Assuming, against the fact, that a certain restriction of competition is the necessary result of this agreement if it is allowed to proceed, it plainly appears by its terms to be only such restriction of competition as is necessary to secure "just and reasonable rates."

By the Interstate Commerce act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates, as has been pointed out, are required to be published and kept open to public inspection, and to be filed with the Commissioners; and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners, and the companies are also made subject to the state laws regulating rates.

The precise question, therefore, under this clause of the Anti-Trust act, is whether a contract that produces a result which the Interstate Commerce act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is for that reason a contract for the unlawful restraint of trade. Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce act prohibits.

It is the statutes themselves that have prescribed a defini-

tion of this clause of the Anti-Trust act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of transportation which the Interstate Commerce act contemplates and provides for, are rates that are just and reasonable to the carriers as well as to the carried, cannot be open to doubt. The very words "just and reasonable" employed in that act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered, there can be no comparison. It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other. This is the construction which this court have given to the Interstate Commerce act in this very particular.

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust act taken by itself, but by that language considered in connection with the other statute of the United States which (if this applies) is *in pari materia*, and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect of them. Granting that the Anti-Trust act in terms makes all contracts unlawful that are in anywise "in restriction of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce act as construed by this court recognizes as the right of railway companies to receive, and provides means to secure? It will hardly be claimed that the elaborate provisions of the Interstate Commerce act on the subject of reasonable rates are repealed by the Anti-Trust act. If both are to stand, as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Quite aside from the provisions of the Interstate Commerce act, giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same

result is reached under the principles of the common law. The term "restraint of trade" employed in the Anti-Trust statute has a common law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the agreement an infringement of this statute, it must, therefore, be one that would be void at common law. It is respectfully submitted on this point that in the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well-settled common law definition distinct from its literal meaning, that is assumed to be the meaning intended, unless a different definition is prescribed in the statute. Even the Constitution of the United States, a political document of an entirely unique character, has been from the outset subjected by this court to this rule of construction.

Even if it should be held that the language of the Anti-Trust act forbids any contract in restraint of trade, however just, reasonable and necessary, the agreement here in question would not fall within the prohibition, because it does not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

This view is so fully presented and discussed in the brief of Messrs. Carter and Ledyard, that further argument in support of it is not requisite.

There is no ground whatever for asserting that the agreement infringes the provision of the Anti-Trust act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or at most, of a few. That is the plain meaning of it as employed in the act. No feature of the agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

Its effect will be, if it is successful, not to diminish, but to increase transportation facilities, by preserving roads that might otherwise be driven from the field.

IX. If the construction of the Anti-Trust act which was adopted by the court in the *Trans-Missouri case* is to stand, it is respectfully insisted that the act, so far as thus interpreted and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the *Trans-Missouri case*, because no such construction of the act was anticipated by counsel. Nor was it considered by the court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered, unless raised by the party affected.

The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether the agreement here under consideration is one that may be prohibited by legislation, without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

In the *Trans-Missouri case*, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and the minority opinions of the court, that its substantive character and purpose were such as the answers in the case aver and set forth. It was for this reason believed by the minority of the judges that it could not have been the intention of Congress that such a contract should be made a penal offence. But it was held by the majority that the language of the act admitted of no other construction. Though it was conceded in the opinion of the court that the arguments against that conclusion "bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply

of maintaining those rates which were reasonable and fair." And in the opinion of the minority of the court by Mr. Justice White, he remarks, after stating the general features of the contract, "I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court rests upon that hypothesis."

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust act, as so construed, is thus both established and conceded, and the question distinctly arises, whether legislation having such a result is within the power of Congress.

That the operation of the act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants (whether rightfully or not) of both liberty and property to a very grave and perhaps ruinous extent, is not open to question. A just freedom of contract in lawful business is one of the most important rights reserved to the citizen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment. And when any class in the community is so precluded, it is to that extent "deprived of the equal protection of the laws." These are elementary propositions in constitutional law, and have been often asserted by this court.

In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust act, if it is held applicable to the agreement in this case, we respectfully insist: (1) That the act deprives the defendants of both liberty and property, by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do. That no such contract can be prohibited by law without a violation of the

constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it. And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

(2) That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because (*a*) Those intended to be benefited are not the public, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection. (*b*) Even if such class is held to constitute the public, it is not entitled to the suppression of all restriction upon competition. Because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labor and property without just compensation. (*c*) The legislation in question is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object, is already effectually provided for by full and careful Congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public. (*d*) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity, and would injure rather than benefit the very class in whose behalf it is contended for.

(3) That even if it were admitted that further legislation against restrictions upon competition was both constitutional and necessary, the provisions of this act, in forbidding all such restrictions, are not justly adapted to the only end that is

admissible on public policy. If this one is of that character it must fail, but if not, it cannot be made unlawful because it is unnecessary. Few special contracts would be necessary if all parties concerned in the transactions to which they refer would always do right.

Mr. George F. Edmunds for the Pennsylvania Railroad Company, appellee.

Before the agreement in question was made, the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation.

This is admitted by pleadings.

This being true, these rates could not have been either raised or lowered, under then existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations, as follows:

(1) To aid in fulfilling the purposes of the Interstate Commerce act; to coöperate

(2) with each other and adjacent transportation associations to establish and maintain

(3) reasonable and just rates, fares, rules and regulations on state and interstate traffic; to

(4) prevent unjust discrimination, and to secure the reduction and concentration of agencies

(5) and the introduction of economies in the conduct of the freight and passenger service.

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other

purpose, and no secret or covert design in respect of the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named."

The first six articles of the contract provide for organization and administration, in respect of which no criticism has been suggested, except as to section 5 of Article V in connection with the Solicitor General's contention in regard to Article VII.

Article VII is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law, it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides:

"SECTION 1. The duly published schedules of rates, fares and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares and charges, and the rules applicable thereto."

This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the preëxisting just, reasonable and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain

words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or any sense whatever. In the instance of this first provision of the agreement, they have engaged to do that very thing and that very thing only in the form of specific language referring to a specific and existing just, reasonable and lawful state of things which they were then acting upon.

The second section of Article VII is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer to this is that the pleadings distinctly admit that there was no evasive intention, or other unjust purpose, in any part of the arrangement. It is, therefore, not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this section, it is sufficient to say that the very next section of the same article declares that

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-

operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers, as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce act, or any other law, and so forth; and it commands the managers to coöperate to these ends with the Interstate Commerce Commission.

When the managers come to act, then, under these powers, how do they start? They start with a system of rates established, not by the agreement, but before it was made, and confirmed by the agreement, which were confessedly in conformity with and in promotion of the Commerce act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the second section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all, and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned contained in the Commerce act. Can this be an authority to restrain trade under any definition of the word "restraint"? The only restraint is a restraint against a violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce act. If we assume that the restraint of trade mentioned in the Trust act may be a restraint of innocent and just proceeding, can any one maintain that it makes illegal an agreement not to violate law, but to obey it?

It was obvious when this agreement was made that rates then existing and being in all particulars reasonable and equal, might, in the course of changes in production, trade, and under other conditions over which the railways could have no control,

become unjust, unreasonable and inapplicable to the new conditions, and that in such case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice and law should require under such conditions. It was to provide for this that sections 2 and 3 of the seventh article were inserted. As I have said, they were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbidden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company, or any number of companies affected, could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But it is asked, would not the road thus refusing be subjected to the fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could compel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce act itself in terms requires the same reasonable and just conduct by railways towards each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of Article VII is perfectly valid under any possible construction of the language of the Trust act, as well as in perfect conformity with and in aid of the Commerce act.

I may as well here compare the provisions of Article VII, which contains the great leading feature of the whole agree-

ment, with the agreement in the *Trans-Missouri case*. The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in the first section of Article VII had already been independently established, were, in fact, reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission, and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interests of the country. It was an engagement to stand by that state of things and for the express purpose of continuing that happy state of things — exactly those that the law requires — that this engagement was made. Turn now to the Trans-Missouri agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, etc.; and, in the very words of the agreement, for the purpose of mutual protection, and for nothing else.

The Trans-Missouri agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and did not, evidently, intend to impose the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping up and increasing rates, instead of for the purpose (as in the Joint Traffic agreement) of keeping them just and in conformity with law, whether by reduction, increase or other readjustment.

Other essential differences are stated in my brief which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that

existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a coöperative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the *Trans-Missouri case* alleged — there being, it will be remembered, no previously established rates that were agreed upon — that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated in my brief. The practical construction by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts.

The next principal contention of my learned brother is that Article VIII of the agreement violates the Trust act by restraining trade.

The words of the article are as follows:

"ARTICLE VIII.

"PROPORTIONS OF COMPETITIVE TRAFFIC.

"The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done."

This article provides that the managers shall endeavor so far, and so far only, as obedience to law — that is to say, conformity with the Commerce act and conformity with the Trust act — would permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is a sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than as the law shall permit. If, therefore, the Trust act condemns the effort referred to, then not to make the effort. If the Interstate Commerce act, either in terms or spirit, is adverse to such an effort the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in

the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads, passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads was necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the eighth article then, I submit, was wholesome, lawful and necessary, and it was the very thing that one of the clauses in the Commerce act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a restraint of trade, in one sense or another. It will be seen on examining the agreement that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the association. This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can be established that the thirty days' notice was too long. It is a matter of history that when the Commerce act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should

be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce act for notice was much too short, and that unjust inequalities have arisen, again and again, from changes in rates by particular roads on such short notice that favored customers and favored localities, etc., would get advantages over others, in violation of the spirit and substance of the Commerce act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads and all communities, that this period of thirty days instead of ten was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as it regards the provision I have just spoken of, as well as it regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support of and in promotion of trade. Trade is a general word, and its operations, like all other operations that require cooperating and associating forces and arrangement, are advanced by, and indeed, cannot be carried on truly and honestly for public interests without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain but advance and promote the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics, the safety valve of a locomotive, with its counterweight, regulates and restrains, or gives off, the accumulating steam in the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all

this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of the trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it, even as an incident. Wherever it is practised, it is practised apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various important points to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one State to another.

I refrain from making any observations on the constitutional question arising if the Trust act is to be construed as forbidding innocent contracts promotive of public policy, which I have insisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter is left entirely to my brother Mr. Phelps.

In respect of the meaning of the words of the Trust act, I beg to ask your Honors' careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and, second, to the citations I have made from law writers, showing a distinct and separate classification of the two phrases,

"restraint of trade in general" and "partial restraint of trade." If these writers are correct (as nobody doubts, I think, they are), and the two phrases were known and treated in the law at the time of the passage of the act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the act shall be assigned to the first class, and not carried over into the second.

Mr. Solicitor General, for the United States, in conclusion.

I. It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the Anti-Trust law makes the agreement illegal and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provision of the law declaring the illegality and authorizing injunction proceedings.

II. It is insisted that an agreement in restraint of trade must restrain trade — that is, reduce or diminish it; that *trade* must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the Government and people from the creation of monopolies. It is a question of method rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life.

III. It is said that competition is not trade, but a mere incident of trade; that what prevents competition does not

necessarily injure trade; on the contrary, to restrict competition may benefit trade, that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the mass of the people; that there is a spirit of unrest, of dissatisfaction, and that to avoid the effects of ruinous competition among employers and employés combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it. Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand — a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result not from competition, but the throttling of competition by trusts and combinations, which seek to control production and transportation and dominate both workingmen and consumers. Against these the individual citizen protests. He does not demand *no* competition, but *fair* competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

IV. It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it cannot stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a

valuable plant cannot be withdrawn, nor can labor skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all. There are sections where a number of years ago it was profitable to make iron out of local ores. Millions of dollars were invested in furnaces. Workingmen skilled in iron-making settled there, and with their earnings bought property and built homes. Subsequently, in other sections more accessible to the markets, with cheaper ores, modern furnaces were erected and cheaper iron began to be made. The old furnaces could not meet the competition of the new. They had to be abandoned. Was it possible to withdraw the capital invested in them? Not at all. It was lost. The workingmen, too, suffered. They were thrown out of work, ran up debts, lost their homes.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public, but the person or corporation or region which cannot lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive

business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest. The poorer roads can get the business by putting themselves in shape to do the business. Roads equally fitted to do the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result, naturally, not in ruining the roads, but in building them up. Under competition, the best road fixes the rate; under combination, the poorest road. Is it just to make the public pay rates from Chicago to the East fixed by the poorest system protected by the Joint Traffic agreement?

V. It is contended there is no restraint on trade, because the railways still exist with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate cannot be made except by resolution of the board of a member and after thirty days' notice to the managers.

It is true the railways exist with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the things transported. This operates as a burden upon commerce, and a restraint of trade.

If a State should levy a tax on goods transported through it, this court would hold such an act unconstitutional, because it laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition decreases the business of railroads but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates mean less traffic. It may be to the

interest of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

VI. It is insisted that rates must be stable, not subject to change; that a manufacturer cannot safely make goods nor a dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious that the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter, by land and water, will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the Interstate Commerce law nor the Joint Traffic agreement attempts it. Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to the managers of the association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency towards cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.

VII. Uniformity in rates is declared to be essential, and it is urged that the provisions of the Interstate Commerce law favoring uniformity cannot be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the Interstate Commerce act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction in rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the

association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

The uniformity demanded by the Interstate Commerce act is uniformity in the treatment by *each* railroad of *its own* patrons. The second section prohibits a common carrier from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for an equal distance. The third section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or the places served by *it*. And so, too, with reference to the long and short haul provisions in the fourth section.

The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was forbidden. Competition between railroads was preserved, and to secure the benefits of competition to all patrons of each road it was provided that the competition should be open and above board, so that the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefits of competition to all, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it has to compete. The competition was to be restricted to where it belongs; between the railroads and not between the shippers. If a railroad can afford to carry the freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

VIII. It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in

operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it, each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centres. The argument, then, amounts to this, that the rates on through traffic are to be kept up in order to preserve the weak roads as going concerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of Government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of the land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

IX. It is said that the Interstate Commerce act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition, but to preserve it and secure its benefits to all. Competition between independent lines was preserved and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons were prohibited. Thus the benefits of open competition were insured to all. The policy was — among the patrons of each road uniformity, but between the roads open competition.

X. The point is made that railways are public highways, and the furnishing of railway transportation a governmental function; therefore the Government should eliminate the ad-

vantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the Government may regulate it. Government, state and Federal, has done this, by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable nor desirable. Absolute uniformity, extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolutely arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers, without distinction. Each railroad should be required to treat its patrons — persons and places — with fairness and equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary, it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this not only in rates but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for by Mr. Carter, would logically prevent all competition, whether in rates or service.

If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation of these roads now under the agreement. The public is not interested in consolidation except as it affects competition. The constitution and laws of many States prohibit the consolidation of railroads, but only of *competing* railroads. Lines which do not compete may con-

solidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the antipooling section of the Interstate Commerce act. The pooling of freights and the division of earnings is not bad in itself. It is bad, because used to stifle competition. Equally bad is the Joint Traffic agreement before the court, which operates as effectively as any pooling arrangement ever devised. The people have not stopped to inquire whether consolidation would result of necessity in unreasonable rates; neither have they stopped to inquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade.

The railroads say that if they are not permitted to prevent competition they will compete and in doing so violate the Interstate Commerce law; that they should be permitted to combine for the purpose of preventing violations of law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for law based solely on self-interest is delusive and evanescent.

XI. An attempt is made to distinguish this case from the *Trans-Missouri case* by saying that here the association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies; while in the *Trans-Missouri case* the association was given power to fix rates. But in the Trans-Missouri

agreement the association was only given power to fix reasonable rates, and the fact that the rates fixed by the association during its existence were fair and reasonable was admitted.

In the *Trans-Missouri case*, the association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve authority to keep them up after progress and invention should render them excessive and unreasonable. But in point of fact, as pointed out, the Joint Traffic agreement vests in the association, through the managers, with appeal to the board of control, the authority to change rates. This authority is more coercive than that conferred by the Trans-Missouri agreement.

Under the Trans-Missouri agreement five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting the association voted on all changes proposed. All parties were bound by the decision of the association "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association. . . . Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect upon the same day." Moreover, each member of the Trans-Missouri association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving the chairman notice of its action, so the good faith of the transaction might be passed upon by the association at its next meeting.

Thus, under the Trans-Missouri agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice, make an independent rate, notwithstanding the action of the association. But under the Joint Traffic agreement no company can

deviate from the rates as fixed by the managers, except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with the managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision that "the managers, upon receipt of such notice, shall act promptly upon the same for the protection of the parties hereto."

Mr. Carter, in his argument, explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by the association, through its managers, was required in order that the association might have time to determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of the association protected.

XII. It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give it to a poor road in order to do for it what the public along its line ought to do.

XIII. The provisions of the Interstate Commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without suppressing competition. The tenth article of the Joint Traffic agreement provides that "the managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rates, fares and rules established under this agreement," and it is

contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the third section of the Interstate Commerce act shows that the mischief suggested is fully provided for in its concluding paragraph, which provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, "and shall not discriminate in their rates and charges between such connecting lines."

XIV. It is insisted that if Congress had intended the Anti-Trust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it would have used the language "every contract in *any* restraint of trade," etc., "is hereby declared to be illegal."

It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in any restraint of trade," and much better language. With due respect to the learned counsel, it might be suggested that if his criticism of the language used be a valid one, why may not the next commentator on this section forcefully insist that Congress should have said "every contract in *any and every* restraint of trade is hereby declared to be illegal"?

XV. The reply to Mr. Phelps' attack upon the constitutionality of the Anti-Trust law as construed by this court in the *Trans-Missouri case*, is to be found in the argument of Mr. Carter that railways are public highways, and in the furnishing of public transportation perform in a sense a governmental function. The right of the Government to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The States regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn* v. *Illinois*, 94

U. S. 113, applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the fifth section of the Interstate Commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling or the combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

XVI. *As to the remedy in the case of an unreasonably low rate.* Judge Cooley, in a well-considered opinion, *In re Chicago, St. Paul & Kansas City Railway*, 2 Int. Com. Com. 231, approved by this court in *Interstate Commerce Commission* v. *Cincinnati, N. O. & Texas Pacific Railway*, 167 U. S. 479, 511, held that under the Interstate Commerce law the commission has no power to determine that a rate is unreasonably low and to order the carrier to refrain from charging such rate on such ground.

XVII. *As to the remedy in the case of an unreasonably high rate.*

The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive, he gets so much less for his grain or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the Interstate Commerce act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the Interstate Commerce law.

Mr. James A. Logan and *Mr. John G. Johnson* filed a brief on behalf of the Pennsylvania Railroad Company and eight other railroad companies, appellees.

Mr. Robert W. de Forest and *Mr. David Willcox* filed a brief on behalf of the Central Railroad Company of New Jersey, appellee.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

This case has been most ably argued by counsel both for the Government and the railroad companies. The suit is brought to obtain a decree declaring null and void the agreement mentioned in the bill. Upon comparing that agreement with the one set forth in the case of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases. The respondents, however, object to this, and give several reasons why this case should not be controlled by the other. It is, among other things, said that one of the questions sought to be raised in this case might have been but was not made in the other; that the point therein decided, after holding that the statute applied to rail-

road companies as common carriers, was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided, while it is plainly raised in this.

Again, it is asserted that there are differences between the provisions contained in the two agreements, of such a material and fundamental nature that the decision in the case referred to ought to form no precedent for the decision of the case now before the court.

It is also objected that the statute, if construed as it has been construed in the *Trans-Missouri case*, is unconstitutional, in that it unduly interferes with the liberty of the individual and takes away from him the right to make contracts regarding his own affairs, which is guaranteed to him by the Fifth Amendment to the Constitution, which provides that "no person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This objection was not advanced in the arguments in the other case.

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention, because, as is stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-Trust statute has been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the *Trans-Missouri case* clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case on the part of the Government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account. If

the agreement did not in fact restrain trade, the Government had no case.

If it did not in any degree restrain trade, it was immaterial whether the statute embraced all contracts in restraint of trade, or only such as were in unreasonable restraint thereof. There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree. Hence, it was necessary to determine the fact as to the character of the agreement before the case was made out on the part of the Government.

The great stress of the argument on both sides was undoubtedly upon the question as to the proper construction of the statute, for that seemed to admit of the most doubt, but the other question was before the court, was plainly raised, and was necessarily decided. The opinion shows this to be true. At page 341 of the report the opinion contains the following language:

"The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

* * * * *

"Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local.

"To that end the association is formed and a body created which is to adopt rates which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is

to put a restraint upon trade or commerce as described in the act. For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it."

The bill of the complainants in that case, while alleging an illegal and unlawful intent on the part of the railroad companies in entering into the agreement, also alleged that by means of the agreement the trade, traffic and commerce in the region of country affected by the agreement had been and were monopolized and restrained, hindered, injured and retarded. These allegations were denied by defendants.

There was thus a clear issue made by the pleadings as to the character of the agreement, whether it was or was not one in restraint of trade.

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court, and was consciously, purposely and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the court did not touch upon the other aspect of the case, in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held im-

material, but only for the reason that the agreement did in fact and by its terms restrain trade.

Second. We have assumed that the agreements in the two cases were substantially alike. This the respondents by no means admit, and they assert that there are such material and substantial differences in the provisions of the two instruments as to necessitate a different result in this case from that arrived at in the other.

The expressed purpose of the agreement in this case is, among other things, "to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic." The companies agree that the schedule of rates and fares already duly published and in force and authorized by the companies, parties to the agreement, and filed, as to interstate traffic, with the Interstate Commerce Commission, shall be reaffirmed, and copies of all such schedules are to be filed, with the managers constituted under the agreement, within ten days after it becomes effective. The managers may from time to time recommend changes in the rates, etc., and a failure to observe the recommendations is deemed a violation of the agreement. No company can deviate from these rates except under a resolution of its board of directors, and such resolution can only take effect thirty days after service of a copy thereof on the managers, who, upon receipt thereof, "shall act promptly for the protection of the parties hereto." For a violation of the agreement the offending company forfeits to the association a sum to be determined by the managers thereof, not exceeding five thousand dollars, or more upon the contingency named in the rule.

So far as the establishment of rates and fares is concerned, we do not see any substantial difference between this agreement and the one set forth in the *Trans-Missouri case*. In that case the rates were established by the agreement, and any company violating the schedule of rates as established under the agreement was liable to a penalty. A company could withdraw from the association on giving thirty days' notice, but while it continued a member it was bound to charge the rates fixed, under a penalty for not doing so. In

this case the companies are bound to charge the rates fixed upon originally in the agreement or subsequently recommended by the board of managers, and the failure to observe their recommendations is deemed a violation of the agreement. The only alternative is the adoption of a resolution by the board of directors of any company providing for a change of rates so far as that company is concerned, and the service of a copy thereof upon the board of managers as already stated. This provision for changing rates by any one company is absent from the other agreement. It is this provision which is referred to by counsel as most material and important, and one which constitutes a material and important distinction between the two agreements. It is said to be designed solely to prevent secret and illegal competition in rates, while at the same time providing for and permitting open competition therein, and that unless it can be regarded as restraining competition so as to restrain trade, there is not even an appearance of restraint of trade in the agreement. It is obvious, however, that if such deviation from rates by any company from those agreed upon, be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that as to that company the agreement might as well be rescinded. This result was never contemplated. In order, therefore, not only to prevent secret competition, but also to prevent any competition whatever among the companies parties to the agreement, the provision is therein made for the prompt action of the board of managers whenever it receives a copy of the resolution adopted by the board of directors of any one company for a change of the rates as established under the agreement. By reason of this provision the board undoubtedly has authority and power to enforce the uniformity of rates as against the offending company upon pain of an open, rigorous and relentless war of competition against it on the part of the whole association.

A company desirous of deviating from the rates agreed upon and which its associates desire to maintain is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. Counsel for the association themselves state that the agreement makes it the duty of the managers, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. By this course the competition is open, but none the less sufficient on that account, and the desired and expected result is to be the yielding of the offending company, induced by the war which might otherwise be waged against it by the combined force of all the other parties to the agreement. Under these circumstances the agreement, taken as a whole, prevents, and was evidently intended to prevent, not only secret but any competition. The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient, in the face of this power of the managers to enlist the whole association in a war upon it. This is not all, however, for the agreement further provides that the managers are to have power to organize such joint freight and passenger agencies as they may deem desirable, and if established they are to be so arranged as to give proper representation to each company, and no soliciting or contracting passenger or freight agency can be maintained by any of the

companies, except with the approval of the managers. They are also charged with the duty of securing to each company, party to the agreement, equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done. The natural, direct and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever.

It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. The distinction is unimportant. It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon and receives its equitable proportion of the traffic.

The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases on any such ground. Indeed, counsel for one of the railroad companies on this argument, in speaking of the agreement in the *Trans-Missouri case*, says of it that its terms, while substantially similar to those of the agreement here, were less explicit in making it just and reasonable.

Regarding the two agreements as alike in their main and material features, we are brought to an examination of the question of the constitutionality of the act, construed as it has

been in the *Trans-Missouri case*. It is worthy of remark that this question was never raised or hinted at upon the argument of that case, although, if the respondents' present contention be sound, it would have furnished a conclusive objection to the enforcement of the act as construed. The fact that not one of the many astute and able counsel for the transportation companies in that case raised an objection of so conclusive a character, if well founded, is strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface and were not then apparent to those counsel.

The point not being raised and the decision of that case having proceeded upon an assumption of the validity of the act under either construction, it can, of course, constitute no authority upon this question. Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat

restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term;

and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins* v. *United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint

of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether the State should itself build them or permit others to do it. The State did not build them, and as their building required, among other things, the appropriation of

land, private individuals could not enforce such appropriation without a grant from the State.

The building and operation of a railroad thus required a public franchise. The State would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise when granted by the State becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine

as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

The prohibition of such contracts may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution or in any of the amendments to that instrument. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312–336; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447–479.

Among these limitations and guarantees counsel refer to those which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer* v. *Louisiana*, 165 U. S. 578, is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in the Fourteenth Amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful, it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie* v. *United States*, 157 U. S. 160.

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the

legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid.

Finally, we are asked to reconsider the question decided in the *Trans-Missouri case*, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri case*.

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clea that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be

secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former decision, or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce. Upon that question it is contended that agreements between railroad companies of the

nature of that now before us are promotive instead of in restraint of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while, at the same time, otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached by reason of the peculiar nature of railroad property which must be operated and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is matter of very great uncertainty, depending upon many contingencies and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may and often do continue in existence and engage in their lawful traffic at some profit, although they are competing railroads and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible but probable that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do, in regard to the various questions herein discussed, we think it unnecessary to

further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri case.*

The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are reversed, and the case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with this opinion.

MR. JUSTICE GRAY, MR. JUSTICE SHIRAS and MR. JUSTICE WHITE dissented.

MR. JUSTICE MCKENNA took no part in the decision of the case.